Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

SHIRLEY PITTMAN, BRUCE BERNDT, RALPH CUSICK, DAVID T. PETERSON, GWENDOLYN STEELE-BUTTE, FREDERICK SEARS, individually and as class representatives,
Petitioner,

v.

THE CHICAGO BOARD OF EDUCATION, ROLAND W. BURRIS, Attorney General of the State of Illinois, RICHARD M. DALEY, Mayor of the City of Chicago,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where this Court has held that education is perhaps the most important function of state and local governments, and is not the province of special interests, may the Seventh Circuit deny voting rights to millions of Chicago citizens to elect members of Local School Councils by interpreting state law in a manner contrary to the Illinois Supreme Court, the Illinois Attorney General, and the Illinois Legislature.

2. Whether the lower court could properly ignore the holdings of the Illinois Supreme Court in Fumarolo that Local School Councils are the essential unit of educational governance and, as such, that their election requires application of the one-person, one-vote rule.

3. Whether the Federal Court was bound by the Illinois Supreme Court's interpretation of the Illinois Constitution so as to require that the one-person, one-vote rule be applied to elections for positions on Local School Councils.

4. Where principals had earned tenure after three years of satisfactory service as part of a contractual relationship with the Chicago Board of Education and had relied on this as a condition for employment, could this property right be taken without payment of just compensation.

Table of Authorities

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Accord, O'Brien v. Skinner, 414 U.S. 524, 531 (1974) 23

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28 U.S.C. 1652
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105 ILCS 5/34-2.1(a)
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105 ILCS 5/34-2.1(m)
105 ILCS 5/34-2.2(d)
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105 ILCS 5/34-8.4
105 ILCS 5/34-2.3
Ill.Rev.Stat. (1989) ch. 122, §34-2.1(a)
Ill.Rev.Stat. (1989) ch.122, §34-1.01(B)
Ill.Rev.Stat. 1989, ch.122, §34-2.3

P.A. 86-1477, §3402.1

CONSTITUTIONS CITED

U.S. CONST., Fifth Amendment
ILL. CONST. (1970), art. I, ¶2
ILL. CONST. (1970), art. I, ¶15
ILL. CONST. (1970), art. III, ¶3

OTHER AUTHORITIES CITED

BLACK'S LAW DICTIONARY, 5th ed. (1979)

Seventh Circuit Rule 52

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Shirley Pittman, Bruce Berndt, Ralph Cusick, David T. Peterson, Gwendolyn Steele-Boutte, Frederick Sears, individually and as class representatives, respectfully pray that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Seventh Circuit entered on September 1, 1995 and the order of the United States Court of Appeals for the Seventh Circuit denying their request for rehearing entered on November 14, 1995.

OPINIONS BELOW

The opinions and judgment of the Seventh Circuit Court of Appeals in *Pittman, et al. v. Chicago Board of Education, et al., is reported at 64 F.3d 1098.* A copy of the opinion is reproduced in the Appendix at pages 1-11. A copy of the Court of Appeals order denying rehearing is reproduced in the Appendix at pages 49-50. The memorandum opinion and order of the United States District Court is reported at 860 F.Supp. 495. A copy of the District Court's memorandum opinion and order is reproduced in the Appendix at pages 12-49.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 1, 1995. The petitioners filed a timely request for rehearing which was denied on November 14, 1995. This petition for certiorari was filedwithin 90 days of November 14, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

105 ILCS 5/34-1.01(B):

> B. Achieving goals. To achieve these priority goals, the General Assembly intends to make the individual local school the essential unit for educational governance and improvement and to establish a process for placing the primary responsibility for school governance and improvement in furtherance of such goals in the hands of parents, community residents, teachers, and the school principal at the school level.
>
> Further, to achieve these priority goals, the General Assembly intends to lodge with the board of education key powers in limited areas related to district-wide policy, so that the board of education supports school-level governance and improvement and carries out functions that can be performed more efficiently through centralized action.

28 U.S.C. 1652: State laws as rules of decision.

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in thecourts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Jurisdiction over claims arising under the United States Constitution and 42 U.S.C. §1983 was conferred on the District Court by 28 U.S.C. §1331 and 28 U.S.C. §1343. Jurisdiction over the claims arising under the Illinois Constitution was conferred on the District Court by 28 U.S.C. §1367.

In 1989, Public Act 85-1418 changed the organizational structure of the Chicago Public School System, creating a local school council ("LSC") at each attendance center, consisting of the principal and ten elected members (Ill.Rev.Stat. (1989) ch.122, §34-2.1(a)). The Illinois Legislature left no doubt of the magnitude of the change it intended by turning the system upside down. LSC's were intended to be "the essential unit for educational governance and improvement," unlike the Chicago Board of Education, which was expressly intended to support local level governance--a role limited only to those functions that could be performed more effectively through centralized action (Ill.Rev.Stat. (1989), ch.122, §34-1.01(B)). Specifically, the Illinois Legislature expressed its intent as follows:

> To achieve these goals, the General Assembly intends to make the individual local school the essential unit for educational governance and improvement and to establish a process for placing the primary responsibility for school governance and improvement for furtherance of such goals in the hands of parents,community residents, teachers, and the school principal at the local level.
>
> Further, to achieve these priority goals, the General Assembly intends to lodge with the

> board of education key powers in limited areas, so that the board of education supports school-level governance and improvement and carries out functions that can be performed more efficiently through centralized action.

(Ill.Rev.Stat. (1989) ch.122, §34-1.01(B).

The statute gave the elected parents control of each LSC. Of the ten elected members, the six parents were elected only by parents, the two teacher members were elected by each attendance center's staff, and the two community resident LSC members were elected by all others (Id. at §34-2.1(b)).

On November 30, 1990, the Illinois Supreme Court held that the election scheme established by Public Act 85-1418 violated the one-person one-vote component of the Equal Protection Clauses of both the United States and Illinois Constitutions. Fumarolo v. Board of Education, 142 Ill.2d 54, 566 N.E.2d 1283, 1309 (1990):

> There is no support for the contention that such weighted voting is constitutionally permissible on the ground that parents of children currently attending the public schools are disproportionately interested inand affected by decisions made at the local school level.
>
> * * *
>
> In elections where, as here, general governmental powers are concerned, equal voting powers are constitutionally required. Providing voting powers weighted in favor of a limited and transient electorate, that is,

> an electorate whose composition is limited to the period when children of the electors are attending a concerned school, cannot match the broader benefits to be gotten from an election in which local school council members are selected with all voters having equal voting powers.

At the heart of the Illinois Supreme Court's decision in Fumarolo was the determination that the voting scheme had to be judged pursuant to a strict scrutiny standard as the statute placed the exercise of general governmental authority over education in the LSCs. The Illinois Supreme Court gave studied attention to the issue of whether the LSCs exercised general governmental authority and devoted seven full pages of its opinion to it (Id. at 1292-1299). Specifically, the Illinois Supreme Court summarized the defendants' claim that LSCs did not perform general governmental functions as follows:

> The defendants counter that strict scrutiny analysis should not be applied because the local school councils are subordinate panels oftightly limited authority which do not perform "general governmental functions." The local school councils cannot levy taxes, appropriate money, enter into contracts, issue bonds, acquire property, or set basic educational policy at the district level. All of these powers, the defendants point out, are retained by the board of education.

Id. at 1295-96.

The Illinois Supreme Court rejected the defendants' contention. The Court analyzed the statute and determined that LSCs have broad powers over education:

The powers exercised by the local school councils are broad. They include: (1) selecting the principal to serve under a four-year performance contract (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(1)), establishing criteria to be included in the principal's performance contract (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(3)), evaluating the performance of each principal and determining whether because of that performance the principal's contract shall be renewed or whether the performance was professionally deficient (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(1)); (2) approving the expenditure plan prepared by the principal in consultation with the local school council with respect to all funds allocated and distributed to the school by the board of education (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(4));(3) making recommendations to the principal concerning textbook selection (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(5)), and attendance and disciplinary policy (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(6)); (4) approving the school improvement plan (see Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(4)) developed by the principal in conjunction with the local school council, school staff, parents and community residents; (5) evaluating teaching resources to determine whether allocations of such resources is consistent with and in furtherance of instructional objectives and school programs, making recommendations to the board, the subdistrict superintendent and the principal concerning any reallocation of resources whenever the council determines that any such

> reallocation is appropriate (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(8)); (6) making recommendations to the principal and subdistrict superintendent concerning appointments of persons to fill vacant, additional or newly created positions for teachers (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(9)); and (7) requesting training and assistance from the board and directing the board to contract with personnel not associated with the school district to train or assist council members (the Act provides that the members of the local school council shall receive training in the areas of school budgets, educational theory and personnel selection (Ill.Rev.Stat. 1989, ch.122, par. 34-2.3(10)). A simple reading of this statutory authority shows the educationally vital powers given the local school councils and the breadth of those powers.

Id. at 1295.

After reviewing the statute, the Illinois Supreme Court noted that upon a reading of the whole Act, "it is clear that the local school councils perform functions which are at the heart of a traditional and vital governmental function: the operation of public education." Id. at 1296. The court noted specifically that the Legislature intended to create a system in which the Board of Education and local school councils played different roles. Bonding, taxing and contracting powers which can be more efficiently performed by a centralized body remained with the Board of Education, but LSCs became the indispensable foundation for educational, governance and improvement:

> The legislature has made the local school councils the indispensable foundation of the school system. * * * The system is structured so that responsibility for operation of the schools is divided between the board and the local school councils, with the local school to be the essential unit for educational governance and improvement. To say that the local school councils do not exercise general governmental functions simply because they do not, like the governmental bodies in Avery, Hadley or Kramer, have the power to tax, issue bonds, or contract is to ignore thestructure and legislative intention of this seemingly unique Act. The power to tax, issue bonds, contract and the like, as stated, was purposely vested by the legislature in a centralized administrative body, the board of education, because the board could more efficiently perform these functions. Control and supervision over the operation of the local schools was vested in the local school councils. The Act specifically created a system in which both the board and the local school councils play different roles. The record shows that the Act was specifically structured in this way because it was felt that the board of education had not been sufficiently responsive to problems experienced by the local schools.

Id. at 1296.

Following the demise of Public Act 85-1418, the General Assembly passed Public Act 86-1477 which was intended to be a temporary Act which simply replaced the election scheme of Public Act 85-1418 with provisions that

required the mayor to appoint the membership of the LSCs (P.A. 86-1477, §34-2.1).

On September 11, 1991, the Illinois Legislature enacted Public Acts 87-454 and 87-455. The Legislature did not attempt to redefine or reallocate the relationship and power between the LSCs and the Chicago Board of Education, or express any disagreement with the Illinois Supreme Court's application of the one-person one-voteprinciple to LSC elections. Instead, for the second time, the Illinois General Assembly expressed its intent that the individual local school councils be "the essential unit for educational governance and improvement" while the Board of Education is given functions that can be performed more efficiently through centralized action . (Compare Ill.Rev.Stat. (1989) ch.122, §34-1.01(B) with 105 ILCS 5/34-1.01(B).) In Public Act 87-455, LSCs were again given the same powers which the Illinois Supreme Court found crucial to its determination that LSCs were general governmental bodies. (Compare Ill.Rev.Stat. (1989) ch.122, §34-2.3 with 105 ILCS 5/34-2.3).

As in Public Act 85-1418, Public Act 87-454 established elementary school LSCs made up of eleven members, the elected majority "six" of whom must be parents or legal guardians of students currently enrolled in the school (105 ILCS 5/34-2.1(a), (d)). The remaining members consist of two elected community residents from the school's attendance area who are not parents of children attending the school, two teachers at the school who are appointed by the Board and the school's principal (Id., §§34-2.1(a), (d), (l). In high schools, the new LSCs additionally included one full-time student member appointed by the Board who has no authority to vote on personnel matters or any other issue concerning the allocation of resources (Id., §§34-2.1(a), (m), 34-2.2(d)).

Instead of allowing only community residents to elect the two community resident members and only parents to elect the six parent members, Public Act 87-454 allowed each community resident and parent voter to cast one vote for up to five candidates. (105 ILCS 5/34-2.1(d)). However, the Act maintained parental control by mandating that only parents could be candidates for the six parent positions and only community residents could be candidates for the two community resident positions (105 ILCS 5/34-2.1(a)).

This lawsuit was filed to challenge the constitutionality of the Legislature's second attempt to create an LSC election scheme which guaranteed parental control of LSCs. The defendants include the Illinois Attorney General, the Chicago Board of Education, and the Mayor of Chicago. In neither the District Court nor the Seventh Circuit Court of Appeals did any defendant ever question or dispute that LSCs have general governmental powers. In fact, at oral argument, defendants advised the Seventh Circuit that they felt they were bound by the Illinois Supreme Court's holding that the one-person one-vote principle applied to LSC elections.

The Seventh Circuit Court of Appeals agreed with plaintiff's claim that the Act violated the one-person one-vote principle. Pittman, et al. v. Chicago Board of Education, et al, 64 F.3d 1098, 1100-1101 (7th Cir. 1995). The Seventh Circuit Court of Appeals determined that the statute's candidacy restrictions, which mandated that parents hold six LSC positions when community residents can only hold two LSC positions, violated the right to vote by substantially diluting the power of non-parent voters (Id.).

The Seventh Circuit's interpretation of state law, however, turned plaintiffs' valid vote dilution challenge into only a theoretical victory. Contrary to the explicit

holding of the Illinois Supreme Court and the clear intent of the Illinois Legislature expressed by the language of the Act, the Seventh Circuit found that under Illinois state law, the one-personone-vote principle did not apply because local school councils were not general governmental bodies (Id. at 1101):

> Only we do not think the principle applicable to elections to so local and specialized a governmental body as these local school councils. We say this with diffidence because it is not argued by the defendants, who have staked their all on persuading us that the school law does not in fact dilute the voting power of nonparent residents. However, one of the exceptions to the principle of waiver of grounds for reversal that is recognized by the Supreme Court and by this court concerns the interest in maintaining harmonious relations between the states and the federal government ("comity"). (Citations omitted.) We cannot think of a more compelling occasion for invoking the exception than when we are convinced of the constitutionality of a challenged state statute even though the state's lawyers have blundered, defending the statute's constitutionality on an unconvincing ground and overlooking the only convincing one.

The Seventh Circuit's decision was, therefore, based entirely on a ground not raised by any defendant. In addition, the Seventh Circuit never addressed the independent state claim and failed to determine whether in light of Fumarolo, the challenged statutes violated the one-person one-vote component of the Illinois Constitution's Equal Protection Clause.

In addition to challenging the election provisions of Public Acts 87-454 and 87-455, the plaintiffs in this matter also included a class of principals who had earned tenure as both teachers and principals in the Chicago Public School system by completing three year probationary periods in each capacity. The plaintiffs were induced to work for the Board by the promise of tenure, earned tenure, and relied on this tenure by failing to pursue other careers or seek employment in other school districts. Public Acts 86-1477 and 87-455 destroyed the tenure which this class of plaintiffs earned as principals by requiring that principals be chosen by the LCSs to serve under 4-year performance contracts (105 ILCS 5/34-8.1). Unlike teachers who continued to retain their tenure and could only be dismissed for cause after a due process hearing. (105 ILCS 5/34-84, 34-85), principals also lost the tenure they earned as teachers (105 ILCS 5/34-8.1, 34-84). In this regard, Public Act 87-455 prevented principals who lost their principalship for reasons unrelated to cause from being reinstated to the prior position they held as a teacher (105 ILCS 5/34-8.1). The plaintiffs contended that their loss of tenure was a taking without just compensation.

REASONS FOR GRANTING THE WRIT

I. AFTER CONCLUDING THAT THE VOTING SCHEME FOR ELECTING MEMBERS OF THE LOCAL SCHOOL COUNCILS VIOLATED THE ONE-PERSON, ONE-VOTE PRINCIPLE, THE SEVENTH CIRCUIT SHOULD HAVE FOLLOWED THE INTERPRETATION OF STATE STATUTE BY THE STATE'S HIGHEST COURT AND APPLIED THE ONE-PERSON, ONE-VOTE PRINCIPLE TO THE ELECTION OF LOCAL SCHOOL COUNCIL MEMBERS.

This case involves the educational governance of the Chicago Public Schools. The voting power of millions

of non-parents has been restricted by a statute which mandates that the educational governance of the public schools be controlled by parents. These underrepresented interests include (1) the parents of pre-school children who plan to send their children to the public schools; (2) parents who would send their children to the public schools if they were better; (3) local businessmen interested in hiring public school graduates; and (4) community residents who know that good schools will increase both property values and the City tax base by attracting new residents to the City and stemming the flight of parents to suburban school districts. Chicago's future is at stake. The long term health and viability of Chicago's school system will determine whether Chicago becomes a poverty-stricken, revenue-starved city surrounded by wealthy suburbs, or a multi-cultural, heterogeneous city.

This Court has repeatedly held that public education concerns all aspects of society. Plyler v. Doe, 457 U.S. 202,221-23 (1982); Hadley v. Junior College Dist., 397 U.S. 50, 55 (1970). Education provides the tools which individuals can use to lead an economically productive life, is vital to the preservation of a democratic system of government, and plays a fundamental role in maintaining the fabric of our society. Plyler, 457 U.S. at 221 (and other decisions cited therein). Statutes which convert our governing bodies to the preserves of a select few have routinely been held to be invalid. Quinn v. Millsap, 491 U.S. 95, 106-7 (1989) (allowing only landowners to become members of a governing board violates equal protection); Hadley v. Junior College Dist., 397 U.S. 50, 57 (1970) (system which discriminates against voters in more populous school districts violates equal protection); Turner v. Fouche, 396 U.S. 346 (1970) (Georgia cannot limit school board membership to landowners); Kramer v. Union Free School Dist., 395 U.S. 621, 633 (1969) (vote cannot be limited to parents, owners of property and renters).

The Seventh Circuit did not dispute the validity of these cases. The Seventh Circuit specifically found that the School Reform Act's statutory guarantee of six out of eight elected seats on the LSC to students' parents "is a clear violation of the principle of 'one man, one vote'." Pittman v. Chicago Bd. of Ed., 64 F.3d 1098, 1101 (7th Cir. 1995). If the opinion had stopped at that point, the lower court would have been reversed. Instead, the Seventh Circuit proceeded to accuse the state of having "blundered" in failing to raise "the only convincing argument," and proceeds on its own to create this argument. The lynchpin of the "only convincing argument" which could save the day for defendants is the following statement:

> The governing body of the public schools of Chicago is the Board of Education of the City of Chicago, not these local councils. Vital public education may be, but these councils, unlike the Board's in Kramer and Hadley do not control it. The interest of the public at large in the councils is, therefore, tenuated.

Pittman et al., v. Chicago Bd. of Ed., et al., 64 F.3d 1098, 1103 (7th Cir. 1995).

This is a remarkable statement for several reasons. First, the statement is not supported by reference to the statutes of the State of Illinois which state precisely the opposite. Second, the Seventh Circuit ignores the opinion in Fumarolo v. Chicago Bd. of Ed., 566 N.E.2d 1283 (1991), an Illinois Supreme Court decision which holds to the contrary, and which specifically rejected the argument the lower court made. Third, this statement justifies a decision predicated upon an argument not raised by either side in this case. Fourth, unless the Seventh Circuit has an expertise in the actual day-to-day operations of the Chicago

Public Schools, which is not apparent, there is no way to know upon what factual basis, if any, this conclusion rests. It is simply a nail hammered into the air upon which the rest of the opinion hangs.

First, contrary to the Seventh Circuit's opinion that Illinois law makes the Chicago Board of Education the governing body of the public schools of Chicago, the Illinois statute not once, but twice, emphasizes that the primary responsibility for the governance and improvement of education is committed to the Local School Councils and thatthe Chicago Board of Education is relegated to "limited areas."

The Illinois statute, in directly addressing Local School Councils, states:

> To achieve these priority goals, the General Assembly intends to make the individual local school the essential unit for educational governance and improvement and to establish a process for placing the primary responsibility for school governance and improvement in furtherance of such goals in the hands of the parents, community residents, teachers, and the school principal at the school level.

105 ILCS 5/34-1.01(B) (emphasis added). The statute then reemphasizes the governmental importance of the Local School Councils, by clearly limiting the authority of the Chicago Board of Education to powers in limited areas:

> Further, to achieve these priority goals, the General Assembly intends to lodge with the board of education key powers in limited areas related to district-wide policy, so that the board of education supports school-level

> governance and improvement and carries out functions that can be performed more efficiently through centralized action.

105 ILCS 5/34-1.101(B) (emphasis added).

The clear meaning and natural implication of the statute cannot simply be ignored. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236-37, 244 (1984). No federal court has authority to effectively rewrite a state statute.

The Seventh Circuit's interpretation of state law is in direct conflict with Fumarolo v. Chicago Bd. of Ed., 142 Ill.2d 54, 566 N.E.2d 1283 (1990)--a decision of the state's highest court and the only state judicial decision addressing the proper position and function of the Local School Councils in the governance of education. Contrary to the Seventh Circuit's interpretation of state law, the Illinois Supreme Court held that Local School Councils are the primary governmental organ for education in Chicago, not the Chicago Board of Education.[1] Id., 556 N.E.2d at 1295. The Seventh Circuit does not even refer to Fumarolo's holding.

Fumarolo is the key decision on the state political organizational aspect of the present case, not only because it is an expression of the state's highest court, but also because that decision specifically rejected a remarkably-similar argument of the role of LSCs now adopted by the Seventh Circuit's opinion. In Fumarolo, the trial court had regarded LSCs as advisory and found that the one-person one-vote principle did not apply. The Illinois Supreme Court rejected this construction, holding:

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[1] Many of these local school councils encompass voting districts larger than many of the suburban school districts.

> The trial court erred in finding that the local school councils did not exercise general governmental powers and in its resulting decision to apply the rational basis test, instead of strict scrutiny. The trial court looked to the absence of a power to tax, issuebonds, and similar considerations, in reaching its conclusion, but did not consider the broad and important powers vested in the local school councils, and it mistakenly judged the councils to be but advisory bodies.

Fumarolo, 566 N.E.2d at 1292 (emphasis added). The Illinois Supreme Court further stated:

> Considering the whole Act, and the local school councils in particular, we hold that the local school councils are essential units of educational governance, empowered to make important budgetary, educational and administrative decisions regarding the Chicago public school system, and that the statutory scheme which denies or dilutes the vote of certain citizens must therefore be necessary to advance a compelling State interest.

Fumarolo, 566 N.E.2d at 1295.

The Illinois Supreme Court also said:

> Upon a reading of the whole Act, however, it is clear that the local school councils perform functions which are at the heart of a traditional and vital governmental function: the operation of public education. The legislature has made the local school

> councils the indispensable foundation of the school system. * * * The system is structured so that responsibility foroperation of the schools is divided between the board and the local school councils, with the local school to be the essential unit for educational governance and improvement. To say that the local school councils do not exercise general governmental functions simply because they do not, like the governmental bodies in Avery, Hadley or Kramer, have the power to tax, issue bonds or contract is to ignore the structure and legislative intention of this seemingly unique Act. The power to tax, issue bonds, contract and the like, as stated, was purposely vested by the legislature in a centralized administrative body, the board of education, because the board could more efficiently perform these functions. Control and supervision over the operation of the local schools was vested in the local school councils. The Act specifically created a system in which both the board and the local school councils play different roles. The record shows that the Act was specifically structured in this way because it was felt that the board of education had not been sufficiently responsive to problems experienced by the local schools.

Fumarolo, 566 N.E.2d at 1296 (emphasis added).

State law is for the state to enunciate. Spieser v. Randall, 357 U.S. 513, 522 n.7 (1958) ("...the basic constitutional principle that the construction of state laws isthe exclusive responsibility of the state courts"). Accord, O'Brien v. Skinner, 414 U.S. 524, 531 (1974) ("[I]t is not

our function to construe a state statute contrary to the construction given it by the highest court of the State"). The Rules of Decision Act is mandatory, not discretionary. Pursuant to its terms, "[t]he laws of the several states,..shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. 1652. (See also, Watson v. McCabe, 526 F.2d 286, 288 (6th Cir. 1976).

The pronouncements of the state's highest court on a question of state law are binding on federal courts. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 n.9 (1978) ("Although a contrary construction might well save the statute from constitutional invalidity, 'it is not our function to construe a state statute contrary to the construction given it by the highest court of a State'"); Garner v. Louisiana, 368 U.S. 157, 166 (1961) ("We of course are bound by a State's interpretation of its own statute...").

Third, the state's executive branch, through the state's lawyers, remained faithful to the state's legislative intention and the state Supreme Court's construction. Although construction of a state statute by the state's Executive Branch is due deference, even in the absence of state court precedent, such as Fumarolo, Huggins v. Isenbarger, 798 F.2d 203, 209 (7th Cir. 1986) (Easterbrook concurring), the Seventh Circuit treated the state's attorney's expression of the state's position as a "blunder" (Slip Op. at 4), rather than as an expression by the state's Executive Branch of the state's statutory policy and provisions.

It is difficult to imagine a more bizarre situation than a United States Court of Appeals cavalierly stating that "the governing body of the public schools of Chicago is the Board of Education of the City of Chicago, not the local school councils" without even referring to the

language of the statute and the interpretation given it by the state's highest court. Indeed, this form of opinion, where the last word in legislative interpretation comes from a panel of judges of the Seventh Circuit, and not from the Legislature which drafted the Act, nor from the Illinois Supreme Court which interpreted the Act, is, to say the least, highly unusual. The Seventh Circuit did not even take the time to analyze, or at least explain to those who might read the opinion, how it distinguishes, or for what reason it ignores, the opinion of the Illinois Supreme Court in Fumarolo v. Chicago Bd. of Ed., in interpreting the language of the Act.

Yet, it may be even more bizarre that the Seventh Circuit adopted the role of the state's alter-advocate to reach an issue not raised by either party, based on lip service to "maintaining harmonious relations between the states and the federal government ('comity')." To the end of contravening every statement of statutory construction and policy which could be offered by the branches of the state government as its spokesman, the Court stated:

> Only we do not think the principle applicable to elections to so local and specialized a governmental body as these local school councils. We say this with diffidence because it is not argued by the defendants, who have staked their all on persuading us that the school law does not in fact dilute the votingpower of nonparent residents. However, one of the exceptions to the principle of waiver of grounds for reversal that is recognized by the Supreme Court and by this court concerns the interest in maintaining harmonious relations between the states and the federal government ("comity"). (Citations omitted.) We cannot think of a more compelling

> occasion for invoking the exception than when we are convinced of the constitutionality of a challenged state statute even though the state's lawyers have blundered, defending the statute's constitutionality on an unconvincing ground and overlooking the only convincing one.

Pittman v. Chicago Bd. of Ed., 64 F.3d 1098, 1101 (7th Cir. 1995) (emphasis added).

"Comity" means "respect for," BLACK'S LAW DICTIONARY, 5th ed. (1979) "The notion of `comity' includes a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." Middlesex County Ethics Committee v. Garden State Bar Assoc., 457 U.S. 423, 431 (1982). Respect for the State of Illinois is hardly shown by ignoring the statutory construction accorded a state statute by every one of its three branches. The Seventh Circuit has ignored the definitive interpretation of the statute by the Illinois Supreme Court; it has ignored the clear statement ofintent by the Illinois Legislature; and it has rebuked the Attorney General for concluding that the Act means what it says. In short, the Court disagrees with the Illinois Legislature, the Illinois Supreme Court and the Illinois Attorney General, all under the general heading of "comity" or "maintaining harmonious relations between the states and federal government."

II.THE SEVENTH CIRCUIT WAS BOUND BY THE ILLINOIS SUPREME COURT'S DECISION THAT THE ILLINOIS CONSTITUTION'S ONE-PERSON, ONE-VOTE PRINCIPLE APPLIED TO LOCAL SCHOOL COUNCIL ELECTIONS.

The Seventh Circuit's analysis should not have ended when it ruled for defendants on the Federal Constitutional claim. The plaintiffs also contended that the one-person one-vote component of the Illinois Constitution's Equal Protection Clause was violated. Since the Illinois Supreme Court has held that the Equal Protection Clause and election provisions of the Illinois Constitution, (Ill.Const. (1970), Article 1, ¶3; Article 4, ¶3), incorporate the same meaning and standards as the one-person one-vote component of the United States Constitution's Equal Protection Clause, Fumarolo, 566 N.E.2d at 1290, the argument that the plaintiffs' votes were unconstitutionally diluted was the same under either Constitution. Accordingly, in one combined argument, the plaintiffs asked the Seventh Circuit to find the LSC election provisions unconstitutional under the one-person one-vote components of both the United States and Illinois Constitutions.

Yet, the Seventh Circuit's opinion completely ignores plaintiffs' claims under the Illinois Constitution. This failure is significant. The Illinois Supreme Court in Fumarolo has held that local school councils have general governmental powers under state law and have rejected any claim that they are too insignificant to merit application of the one-person one-vote standard. Fumarolo, 566 N.E.2d at 1291-1299. A federal court is bound to follow this interpretation of state lawwhen ruling on a state law question (28 U.S.C. 1652). A federal court cannot second guess or deviate from the holding of a state's highest court in regard to the interpretation of a state statute under the State Constitution. (See, Arg. I and the cases cited therein.) A United States Court of Appeals has an obligation to either decide a state law claim, choose not to exercise its jurisdiction over it or certify the state law question to the state's highest court (Seventh Circuit Rule 52). A federal court cannot ignore a state claim.

III.THE COURT SHOULD HEAR THIS MATTER TO RESOLVE A CONFLICT IN THE LAW AS TO HOW PROPERTY RIGHTS ARE DEFINED FOR THE PURPOSES OF THE TAKINGS CLAUSE.

The United States and Illinois Constitutions each provide that property cannot be taken without the payment of just compensation. (U.S. CONST. amd. V; ILL. CONST. (1970), art. I, §15.) In Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), this Court applied the analysis of Board of Regents v. Roth, 408 U.S. 564 (1972), for determining when a property right exists under the due process clause, and held that the same analysis applied to determining whether property exists under the Takings Clause. Ruckelshaus, 467 U.S. at 1001. In Ruckelshaus, this Court stated:

> [W]e are mindful of the basic axiom that "'[p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source, such as state law.'"

Id., at 1001.

After Ruckelshaus, some federal courts of appeal have recognized that "[t]he Roth approach to identifying and defining property rights applies in Takings Clause cases." Calvert Inv. v. Metropolitan Sewer Dist., 847 F.2d 304, 307 (6th Cir. 1988).

The Seventh Circuit, however, has rejected the approach taken by this Court in Ruckelshaus, and has held that the term "property," as used in the Takings Clause, is defined much more narrowly than in the Due Process Clause." Pittman, et al. v. Chicago Bd. of Ed., et al., 64

F.3d 1098, 1104 (7th Cir. 1995). The Seventh Circuit's interpretation of "property" under the Takings Clause is at odds with the plain language of both the United States and the Illinois Constitutions. Neither document states that "property" under the Takings Clause has any different meaning than the term "property" under the Due Process Clause.

The purpose behind the Takings Clause further compels a broad interpretation of the type of property protected by it. The fundamental purpose of the Takings Clause is to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Pruneyard v. Robins, 447 U.S. 74, 84 (1980).

The violation of these basic policies is exactly what has occurred in the case at bar. Tenure was not a legislative gratuity, but a benefit which was earned. The plaintiffs satisfactorily completed three years of employment as teachers to earn tenure as teachers, and then satisfactorilycompleted three years of employment as principals to earn tenure as principals. Tenure was consideration given by the Board of Education as part of the compensation for employment. Plaintiffs have a distinct investment-backed expectation in their tenure. They were induced to work for the Board based on the promise of tenure, earned tenure, and relied on their tenure by failing to pursue other careers or seek employment in other school districts. As this Court in Ruckelshaus noted, the notion of property "extends beyond land and tangible goods and includes the products of an individual's labor and invention." Ruckelshaus, 467 U.S. at 1004.

The need for a decision on how property should be determined under the Takings Clause justifies this Court's involvement in this matter.

CONCLUSION

In an effort to achieve a desired result, the Seventh Circuit Court of Appeals decided this case by ignoring the interpretation of state law as expressed by the State Legislature, the state's highest court, and acquiesced in by the state's executive branch. To compound the error, the Seventh Circuit then completely ignored plaintiffs' claim under the one-person one-vote component of the Illinois Constitution's Equal Protection Clause. Lastly, the Seventh Circuit analyzed plaintiffs' taking claim in a manner inconsistent with the court's precedent. The Seventh Circuit's decision is out of keeping with the proper limits imposed by constitutional federalism. While paying lip service to the principles of "comity", the Seventh Circuit has ignored the Illinois Legislature's express intent, a decision of the state's highestcourt, and plaintiffs' pendent state law claim.

Respectfully submitted,

_____

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In the
United States Court of Appeals
For the Seventh Circuit

No. .94-2850
SHIRLEY PITTMAN *et al.*, individually
and as class representatives,
Plaintiffs-Appellants,

v.

CHICAGO BOARD OF EDUCATION, *et al.*,
Defendants-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No.92 C 2219-Marvin E. Aspen, *Chief* Judge

ARGUED JUNE 5, 1995-DECIDED SEPTEMBER 1, 1995

Before POSNER, *Chief Judge,* and FLAUM and EASTERBROOK, *Circuit Judges.*

POSNER, *Chief Judge.* Until 1988, principals of public schools in Chicago were appointed by the city's board of education, and upon satisfactory completion of three years' service received tenure as principals. In 1988, the state ordained the creation of a local school council for each public school in Chicago. See 105 ILCS 5/34-2.1. Each council was to consist of the principal of the school plus ten members elected for two-year terms, increased by a subsequent amendment to four years. Two of the elected members were required to be teachers and were to be elected by

the public school's staff. Six were required to be parents of children attending the school and were to be elected only by such parents. The remaining two elected members were required to be residents of the area served by the school (but not parents of children attending it) and these two were to be elected by all such residents. The most important powers of a local school council are the selection of the principal and the approval of a plan for the expenditure of the funds allocated to the school by the board of education. The council has no taxing authority and no control over the size of the school's budget, as distinct from the allocation of the budget among the school's activities.

Public school principals mounted a state and federal constitutional challenge to the new law in the Illinois courts, and in 1990 the state's highest court held that the part of the law that limited the eligible voters for the different classes of council members (only staff could elect the teacher members, only parents the parent members, only residents the resident members) violated the equal protection clauses of both constitutions. *Fumarolo v. Chicago Board of Education,* 566 N.E.2d 1283 (111.1990). A year later the state legislature amended the school law. A minor change was that the teacher members of the council would be appointed by the board of education and the principal rather than elected by the school's staff. The major change, designed to conform to *Fumarolo,* was that all eligible voters-that is, all adult residents of the school's district and all parents whether or not residents-could vote for all classes of members of the council, each voter being given five votes (which will be reduced to three beginning in 1988) to allocate as he pleased among the candidates. Still, of the elected members, now down to eight, six had to be parents and the other two residents.

The principals decided to challenge the new law in federal rather than state court, and brought this suit. The district court certified one class consisting of all principals of Chicago public schools and a second consisting of principals who are residents of Chicago and thus eligible to

vote for members of at least one of the local school councils-of which there are more than 500. The district court granted summary judgment for the defendants (the board of education, the mayor, and the state's attorney general), and the plaintiffs appeal. The resident principals complain that their right to vote for representatives of their choice on the local school councils has been unconstitutionally bobtailed by the provision reserving six offices for parents and only two for residents. All the principals complain that by elinilnating their tenure as principals the law violates rights of property and contract that are protected by the U.S. Constitution. So we have a right to vote claim and a right of property claim, and let us begin with the first.

The school law does not permit public school principals to be candidates for the local school councils. Each principal is an ex officio member of the council for his school but may not run in the election for members of any other council. The principals do not complain about this exclusion, and hence they cannot assert any rights that they might have as persons desiring to run in these elections, rights under the First Amendment or the equal protection clause recognized in such cases as *Illinois State Board* of *Elections v. Socialist Workers Party,* 440 U.S. 173, 186 (1979); *Clements v. Fashing,* 457 U.S. 957, 964-66 (1982) (plurality opinion); *Brazil-Breashears v. Bilandic,* 53 F.3d 789, 792-93 (7th Cir. 1995), and *Hatten v. Rains,* 854 F.2d 687, 693 (5th Cir. 1988). The defendants fasten on this omission, arguing that the right of the resident principals to vote in these elections, as distinct from their non-asserted right to run, cannot be infringed by a limitation on eligibility for candidacy. The current school law, under compulsion of the decision in the *Fumarolo* case, gives each resident of each local school district the same number of votes, and this is all that is necessary, the defendants argue, to secure the right to vote held implicit in the First Amendinent and the equal protection clause. E.g., *Burdick v. Takushi,* 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze,* 460 U.S. 780, 787-88 (1983); *Board of Estimate v. Morris,* 489 U.S. 688, 692 (1989). Since in all

likelihood residents who do not have children in the public schools outnumber those who do, the residents will be able to dominate the local school councils despite the reservation of places for parents (as well as for teachers and the principal), since elected officials whatever thefr personal interests or beliefs can be counted on to represent adequately the dominant voting blocs.

At the same time, and inconsistently, the defendants argue that the reservation of places for parents is reasonable because parents have a greater stake in the proper management of the schools in which their children are enrolled than other residents of the school district do. If this is so, it implies that parents cannot be trusted to be the perfect agents of the nonparent residents who vote for them. Parents are assumed to have thefr own agenda, shaped by their parental status.

Anyway it is false that lirnitations on candidacy cannot infringe the right to vote. *Anderson v. Celebrezze, supra,* 460 U.S. at 786; *Bullock v. Carter,* 405 U.S. 134, 143 (1972). This would be obvious *if* the limitations were so designed as to permit only one eligible candidate, so that the electorate would have no actual voting power. The school law is less extreme. But if we assume realistically that persons who have children in a school are not adequate representatives, in a body responsible for the governance of the school, of persons who do not, then the school law brings about a substantial dilution in the voting power of one class of voters, the nonparent residents. Suppose there are 1,200 parents in one of the local school districts and 1,800 nonparent residents, and that the parents vote for parent candidates for the council and the nonparents vote for nonparent candidates. Since there are six of the former and only two of the latter, the result is that the parents obtain a representative by casting on average only 200 votes (1200/6), while the nonparents must cast an average of 900 votes (1800/2) to obtain a representative. This is a clear violation of the principle of "one man, one vote." *Shaw v. Reno,* 113 S. Ct. 2816, 2823 (1993); *Board of Estimate v. Moriis, supra,* 489 U.S. at 692; *Risser v. Thompson,* 930 F.2d *M9,* 553 (7th Cir. 1991).

Only we do not think the principle applicable to elections to so local and specialized a governmental body as these local school councils. We say this with diffidence because it is not argued by the defendants, who have staked their all on persuading us that the school law does not in fact dilute the voting power of nonparent residents. However, one of the exceptions to the principle of waiver of grounds for reversal that is recognized by the Supreme Court and by this court concerns the interest in maintaining harmonious relations between the states and the federal government ("comity"). *Eaglin v. Welborn,* 57 F.3d 496, 499 (7th Cir. 1995) (en banc); *Association of Community Organizations for Reform Now (ACORN) v. Edgar,* 56 F.3d 791, 797 (7th Cir. 1995); see *Cranberry v. Creer,* 481 U.S. 129, 134 (1987); *Nutall v. Creer,* 764 F.2d 462, 464 (7th Cir. 1985). We cannot think of a more compelling occasion for invoking the exception than when we are convinced of the constitutionality of a challenged state statute even though the state's lawyers have blundered, defending the statute's constitutionality on an unconvincing ground and overlooking the only convincing one.

The plaintiffs believe that whenever a state decides to make an office elective, *all* the principles that the Supreme Court has extrapolated from the First and Fourteenth Amendments to regulate the electoral process are fully applicable. If this were so, it would be inconsistent with the principle that the federal Constitution does not prescribe any particular separation of powers, or other internal structure, of state government. E.g., *Whalen v. United States,* 445 U.S. 684, 689 n. 4 (1980); *Hoover v. Wagner,* 47 F.3d 845, 849 (7th Cir. 1995); *Auriemma v. Rice,* 957 F.2d 397, 399 (7th Cir. 1992); *Ragsdale v. Turnock,* 941 F.2d 501, 510 (7th Cir. 1991); *Risser v. Thompson, supra,* 930 F.2d at 554; *Carrick v. Locke,* 882 P.2d 173,177 n. 1 (Wash. 1994); *Bayh v. Sonnenburg,* 573 N.E .2d 398, 404 and n. 8 (Ind. 1991). For it would mean that while the state was free to decide which offices of state government should be elective and which appointive, it could not

create hybrid bodies-such as these local school councils, which have ex officio as well as elected members (some of the ex officio members are the very principals who are challenging the law!)-or otherwise depart from the "democratic" electoral model. What purpose would be served by such rigidity we cannot imagine. More to the point, the law does not require such rigidity. The Supreme Court has allowed states to create special-purpose units of government in which offices are filled by elections no less truncated or bobtailed than the elections for local school councils in the Chicago public school system. *Salyer* Land *Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 731-33 (1973); *Ball v. James,* 451 U.S. 355, 371(1981); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743 (1973) (per curiam). These cases involved irrigation districts in which candidates and electors were limited to farmers, but a number of decisions in lower courts, including our own, have refused to apply the principle of "one man, one vote" to other types of special-purpose governmental bodies as well. *Cantwell v. Hudnut,* 566 F.2d 30 (7th Cir. 1977); State *v. Frontier Acres Community Development District,* 472 So. 2d 455, 457 (Fla. 1985); *Southern Cali-fornia Rapid Transit District v. Bolen,* 822 P.2d 875, *884* (Cal. 1992).

Asked about the Supreme Court cases at argument, the plaintiffs' lawyer said that they involved activities that were the exclusive concern of a particular occupational group, whereas education affects everybody. Yet agriculture has long been recognized as a national activity, *Wickard v. Filburn,* 317 U.S. 111 (1942), whereas the Supreme Court has recently noted the local character of public-school education. *United States v. Lopez,* 115 S. Ct. 1624, 1633, 1634 (1995). Of course education does affect everybody, directly or indirectly, but so does agriculture and in either case it would be absurd to suggest that every adult in the United States should be constitutionally entitled to vote in every election for a local irrigation district or a local school council.

The line between a general-purpose governmental body and a special-purpose (or, as it is sometimes called, a "proprietary") one is wavering and indistinct. We are not even certain that it is the correct line. In *Kramer v. Union Free School District No.15,* 395 U.S. 621(1969), the Supreme Court invalidated a state law that restricted voting for members of school boards to persons who either owned or rented property in the school district or had custody of children in the district's public schools. The school board was a special-purpose governmental body, just like the local school councils in this case-and indeed both cases involve the same special governmental function, education. Similar to *Kramer* is *Hadley v. Junior College District,* 397 U.S. 50 (1970), only involving a junior college district rather than a school district. But there is an important distinction between *Kramer* and *Hadley* on the one hand and our case on the other hand. The school board in *Kramer* and the board of trustees of the junior college district in *Hadley* had the power to tax. 395 U.S. at 623 n. 3; 397 U.S. at 53-54. The local school councils in our case do not. Taxation without representation is abhorrent to Americans, but these local school councils have no power to tax directly and they also have no power to tax indirectly, for they do not have the power to raise revenues through the sale of bonds or to increase the total spending on the schools. There are more than 500 of these councils-all within a single city-and the writ of each one runs no farther than a single school. Basically they select a principal and determine school expenditures but within budgetary limits set by the board of education. They have less power than the board of trustees of a private school.

We are mindful that in neither *Kramer* nor *Hadley* did the Supreme Court single out the power to tax as critical to the decision; and when it came to distinguish these cases in the later irrigation-district decisions the basis for distinction that the Court offered was that nowadays education unlike irrigation is regarded as a vital governmental function-a point that had been stressed in *Hadley* itself.

Id. at 56; see *Ball v. James, supra,* 451 U.S. at 363; id. at 372 n. 1 (concurring opinion); *Sal yer Land Co. v. Tulare Lake Basin Water Storage District, supra,* 410 U.S. at 727-29. But the point has to be considered in context. The boards involved in *Kramer* and *Hadley* were the governing bodies of the schools and colleges, respectively, in the districts. (There seems to have been only one junior college under the governance of the district authority in the *Hadley* case, although this is unclear from the opinions.) The governing body of the public schools of Chicago is the Board of Education of the City of Chicago, not these local councils. Vital public education may be, but these councils, unlike the boards in *Kramer* and *Hadley,* do not control it. The interest of the public at large in the councils is therefore attenuated. Cf. *Southern California Rapid Transit District v. Bolen, supra,* 822 P.2d at 884.

But even if, as we believe, the restriction on voting for the councils is not rendered invalid by the "one man, one vote" rule, it could still be invalid because irrational. And so the voter pnncipals argue, but they cannot win on this ground either. It is common knowledge that the public schools of Chicago are a troubled institution. A change in the method of their governance may or may not bnng about an improvement. That is a judgment for a legislature to make, not a court. There is a nationwide movement toward the decentralization and privatization of governmental functions, and the parent-centered local school councils are one manifestation of that movement. They are an experiment, and may fail, but federal courts enforcing the indistinct commands of "substantive due process" or "rationality review ought not to snuff them out. For then we will never learn from experiments in the governance of public institutions. This particular ex-periment had been up and running for only one year when the lawsuit was filed, and the parties have not placed before us any data concerning the success of the expenment; perhaps it is too soon. We will never be able to evaluate its success if we invalidate the law.

The other cluster of issues in this appeal relates to the principals' loss of tenure. Under the new law, they serve at the pleasure of the local school councils. Being tenured ourselves, we understand the distress felt by the principals at being deprived of an important emolument of their jobs. And although tenure for administrators is uncommon, the school law impairs the principals' tenure as teachers as well. For if they lose their principalship they are not reinstated as teachers but are merely placed on an eligibility list for ifiling vacancies in teachers' positions as these occur. 105 ILCS 5/34-8.1.

Although we are sympathetic to the principals' plight, and far from certain that the sacrifice that they are being asked to make will produce offsetting benefits to Chicago's public school children, we do not think they have a good constitutional claim. Some of their arguinents, such as that the school law is a bill of attainder, are not worthy of discussion. The only two arguments that merit discussion are that the state has impaired the obligation of its contracts, in violation of Article I, section 10 of the Constitution, and that it has taken the principals' property without just compensation, in violation of the Fifth Amendment, held applicable to the states by an interpretation of the Fourteenth Amendment.

If tenure for principals were a term in a contract between the principals and the board of education, the state could not abrogate the term without a greater showing of justification than has been attempted. *United States Trust Co. v. New Jersey,* 431 U.S. 1, 29 (1977); *Peick v. Pension Benefit Guaranty Corp.,* 724 F.2d 1247, 1270 and n. 28 (7th Cir. 1983). It is not a term in a contract. It is a term in a statute, and a statute is presumed not to create contractual rights. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.,* 470 U.S. 451, 465-67 (1985); *Wisconsin & Michigan Ry. v. Powers,* 191 U.S. 379, 387 (1903) (Holmes, J.). A statute is not a commitment by the legislature never to repeal the statute. The only way the state can commit itself is by making a contract, and Illinois has signally failed to do that with

these public school principals. To treat statutes as contracts would enormously curtail the operation of democratic government. Statutes would be ratchets, creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred. Since it has long been understood that statutes are not contracts (the Holmes opinion we cited is from 1903), the principals could not reasonably have relied on the statute giving them tenure as a reason not to ask for a contract. They are entitled to be disappointed by the action of the Illinois legislature in promulgating the new school law, but they are not entitled to be surprised. No justifiable expectation has been defeated.

Job tenure is for some purposes "property" within the meaning of the Constitution, and the principals' tenure has been "taken." But there is a missing link in the principals' alternative argument that this taking violates the takings clause. Job tenure is property within the meaning of the due process clauses, *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538-39 (1985); *Jungels v. Pierce,* 825 F.2d 1127,1130 (7th Cir. 1987), which protect people against deprivations of life, liberty, or property without due process of law. As in *Londermill,* such "property" rights are often found to have been created by statute, see 470 U.S. at 539, but this is not inconsistent with the presumption that statutes do not create contract rights. The legislature can by amending the statute eliminate the property right; but if the statute created a contract right against the state, then the amendment would impair the obligations of contract.

Can by amending the statute eliminate the property right, and did here; and in any event the plaintiffs cannot appeal to the principle that a person cannot be deprived of his property rights without due process of law, because there was no denial of due process. The legislation that deprived the school principals of their tenure (= property) did not violate any procedural right encompassed by the term "due process of law," and we have already seen that it did not deny "substantive due process." That is why the plaintiffs direct us to the takings clause. But "prop-

erty" as used in that clause is defined much more narrowly than in the due process clauses. It encompasses real property and personal property, including intellectual property. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984). But in this circuit anyway, though the Supreme Court left the issue open in *Connolly v. Pension Benefit Guaranty Corp., 475* U.S. 211, 224 (1986), it does not extend to contracts, *Pro-Eco, Inc. v. Board of Commissioners,* 57 F.3d 505, 510 (7th Cir. 1995); *Peick v. Pension Benefit Guaranty Corp., supra,* 724 F.2d at 1276; but see *Madera Irrigation District v. Hancock,* 985 F.2d 1397,1401 (9th Cir. 1993); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 88 (1985)-or to statutory entitlements. *Schroeder v. City of Chicago,* 927 F.2d 957, 961(7th Cir. 1991). There is historical warrant for the narrow reading of "property," William Michael Treanor, Note, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 *Yale L.J.* 694, 711 (1985), but the more important reason for the narrow reading is practical. If a statutory benefit could not be rescinded without the payment of compensation to the beneficiaries, it would be extremely diflicult to amend or repeal statutes, creating the ratchet effect that we discussed in connection with the plaintiffs' argument that the school law impairs their contractual rights.

The school law is constitutional.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

ao 450 (rev.5/85) judgment in a civil case

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

Shirley Pittman, et al

v. JUDGMENT IN A CIVIL CASE

The Chicago Board Of Education, et al

CASE NUMBER: 92 C 2219

jury verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

DATE:6-30-94

clerk: H. STUART CUNNINGHAM

(by) deputy clerk

u.s. government printing office: 1985-806-002

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

SHIRLEY PITTMAN, BRUCE BERNDT, RALPH CUSICK, DAVID T. PETERSON, GWENDOLYN STEELE-BUTTE, FREDERICK SEARS, individually and as class representatives,	)	
Plaintiffs,	)	
v.	)	Case No. 92 C 2219
THE CHICAGO BOARD OF EDUCATION, ROLAND W. BURRIS, Attorney General of the State of Illinois, RICHARD M. DALEY, Mahor of the City of Chicago,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Shirley Pittman, Bruce Berndt, Ralph Cusick, David T. Peterson, Gwendolyn Steele-Boutte, and Frederick Sears bring this twenty-two count complaint challenging the validity of the Chicago School Reform Act, as amended. Presently before the court are the parties' cross-motions for summary judgment. For the reasons set forth below, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted.

I. Background[1]

In 1988, the Illinois General Assembly enacted the Chicago School Reform Act in an effort to improve the quality of the ailing Chicago public school system. Two years later, the Illinois Supreme Court concluded that the portion of the Act providing for local school council elections was constitutionally deficient, and thus struck down the entire statute. Fumarolo v. Chicago Bd. of Educ., 566 N.E. 2d 1287 (Ill. 1990). The Illinois General Assembly amended the statute in the summer of 1991, attempting to remedy those portions of the Act which the Supreme Court found wanting. Plaintiffs now challenge the constitutionality of the amended Act.

In the present action, as in the Fumarolo litigation, two portions of the Act are challenged: the section providing for the election of the local school councils, and the section abolishing "tenure" for Chicago school principals. Each section shall be considered in turn.[2]

A. Local School Councils

In order to decentralize the Chicago school system, and "[to place increased authority for individual school decisions at the individual school level," Fumarolo, 566 N.E. 2d at 1286-87, the Act established local school councils for each grammar school and each high school in

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[1] The parties have submitted an agreed statement of uncontested facts, thus making summary judgment appropriate. See Fed R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

[2] The amendments enacted in 1991 only altered that portion of the Act found constitutionally wanting by the Fumarolo court. As a result, except where otherwise noted, the following discussion of the Act's provisions applies equally to the original statute and the amended version

the Chicago public school system. these local school councils were accorded broad responsibilities, including (1) selecting a principal; (2) evaluating the principal's performance, based in part upon criteria established by the local school council; (3) approving the expenditure plan prepared by the principal with respect to funds allocated to the school by the Board of Education; (4) making recommendations regarding curriculum, textbook selection, and attendance policies; (5) approving a school improvement plan; (6) evaluating the allocation of teaching and staff resources; (7) making recommendations to fill open teaching positions; and (8) requesting training and assistance from the Board of Education in a variety of areas, including school budgets, educational theory, and personnel selection. See Ill. Rev. Stat. 1989, ch. 122, par. 34-2-3; Fumarolo, 566 N.E. 2d at 1295.

The local school councils are comprised of eleven voting members: the principal of the school, two teachers representatives, two residents of the community served by the school ("community representatives")' an six parents of students currently enrolled in the school ("parent representatives)[3] In addition to the above responsibilities, each local school council selects one of its parent or community representatives to sit on a subdistrict council. there are eleven such subdistrict councils, each of which elects and evaluates a subdistrict school superintendent and coordinates the activities of the local school councils within its subdistrict. in addition, each subdistrict council selects one of its members to sit on the school board nominating commission. This body is therefore comprised of eleven subdistrict council representatives, as well as five additional members appointed by the mayor, the

[3] For local school councils serving high schools, the membership also includes one student currently enrolled at the high school.

commission, in an open forum, interviews candidates for the board of education, and presents the mayor with a slate of three candidates for each vacant seat on the board, from which the mayor fills the vacancy.

The focus of the litigants' challenge in Fumarolo was the scheme by which local school council parent and community representatives were elected. Under the original Act, only parents could vote for parent representatives, and only non-parent community members could vote for community representatives. Furthermore, the Act provided that "[each person eligible to vote for an office on the local school council to be filled at an election is entitled to vote for as many candidates as are to be elected to fill that office." Ill. Rev. Stat. ch. 122 Par. 34-2.1(b). As a result, parent voters were allotted six votes each while community members were only entitled to two votes. The Illinois Supreme Court concluded that his voting scheme violated the "one person, one vote" guarantee implicit in the equal protecting clauses of the United States and Illinois Constitutions. Fumarolo, 566 N.E. 2d at 1300. the Court went on to hold that, because the local school councils were unconstitutionally elected ,the selection of the subdistrict councils and school board nominating commission also violated constitutional principles. Ultimately, therefore, the Court concluded that the nominating commission could not properly select candidates for the board of education. Id. at 1303.

Following the Illinois Supreme Court's decision in Fumarolo, the Illinois General Assembly passed an interim measure, Public Act 86-1477, which direct the Mayor of the City of Chicago to appoint the members of each local school council, each subdistrict superintendent, the school board nominating commission, and the board of education within seven days. The mayor obtained a list of the individuals then sitting as members or officers of those bodies, and appointed those persons to the same positions

they had held under the unconstitutional provisions of the School Reform Act. Nine months later, on September 11, 1991, the amendments to the School Reform Act, Public Acts 87-454 and 87-455, became effective. While the basic structure of the local school councils remained the same, i.e. six parent representatives and two community representatives, the voting scheme was altered. The Act now provides:

> Each eligible voter shall be entitled to cast one vote for up to a total of 5 candidates, irrespective of whether such candidates are parent of community resident candidates.

105 ILCS 5/34-2.1(d)(iii). Plaintiffs in the present action now challenge both the mayor's action in appointing the existing members of the various bodies to the positions to which they were unconstitutionally elected or selected, as well as the amended provisions providing for the election of local school councils.

B. Principals

The other mayor issue presented in plaintiffs' complaints relates the portions of the School Reform Act which alter the nature of Chicago public School principals' employment. A brief history of the statutory provisions regarding principals' term of employment is appropriate. In 1902, pursuant to the suggestion of an Education commission appointed by then-Chicago mayor Carter Harrison, the Chicago Board of Education promulgated a rule which essentially providing that principals and teachers who successfully completed a three-year probationary period were entitled to permanent employment. This system remained in place until the Board became embroiled in People ex rel. Fursman v. City of Chicago, 278 Ill. 318 (1917), which involved a labor

dispute between the Board and various educational employees. In 1916, during the course of the Fursman, and concluded that the Board of Education lacked the authority to contract beyond the ensuing school year, thus implicitly upholding the Board's decision to eliminate "tenure" provisions in its rules.[4]

The day after the Fursman decision was filed, the Illinois general Assembly enacted emergency legislation which restored the tenure which principals and teachers had previously enjoyed. Specifically, the relevant statute provided:

> Appointments and promotion of teachers, principals and other educational employees shall be made for merit only, and after satisfactory service for a probationary period of three years, (during which period the board may dismiss or discharge any such probationary employee upon the recommendations, accompanied by the written reasons therefor, of the superintendent of school's) appointments of teachers and principals shall become permanent, subject to the rules of the board concerning conduct and efficiency, and subject to removal for cause....

Laws of Illinois, 723, 731 (1917). This language remained in the statute until 1987. See Ill. Rev. Stat. ch. 122, Sec. 34-84 (1987). In the Chicago School Reform Act, however,

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[4] As used in this opinion, "tenure" is a term of convenience rather than of art. It merely refers to the permanent employment provided by the legislature prior to the School Reform Act, and earned by the plaintiffs in the present action.

the legislature abolished the "tenure" system for principals, and instead provided that principals would be employed under four-year, renewable performance contracts.

II. Discussion

A. Local School Councils

The crux of plaintiffs' argument with respect to the local councils is that the manner in which the representatives are elected is constitutionally defective[5] Acknowledging that there are no cases that have dealt with a system identical to the one here, the parties have focused their discussion on cases which deal with a variety of "candidate restrictions," and their impact on the right to vote. See, e.g., Trafelet v. Thompson, 594 F.2d 623 (7th Cir.) (age limitation on judicial candidates), cert. denied, 444 U.S. 906 (1979); Williams v. Rhodes, 393 U.S. 23 (1968) (system which essentially limits candidates to members of Republican or Democratic parties); Dusch v. Davis, 387 U.S. 112 (1967). Although none of these cases is sufficiently analogous to direct a conclusion regarding the School Reform Act, the principles set forth do, to some degree, provide us meaningful guidance. A careful analysis of these cases is therefore appropriate.

In Dusch v. Davis, 387 U.S. 112 (1967), the Court was asked to assess the validity of the means by which the governing body of the City of Virginia Beach and Princess Anne County, which had been consolidated, was elected. This territory consisted of seven boroughs, three of which

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[5] The equal protection clauses of the United States and Illinois Constitutions are coextensive accordingly, disposal of the federal claim necessarily results in disposal of the state claim as well. See Fumarolo, 566 N.E. 2d at 1290.

were primarily urban, three primarily rural, and one primarily tourist. the virginia legislature provided for a governing council of eleven members under the following system:

> Four members are elected at large without regard to residence. Seven are elected by the voters of the entire city, one being required to reside in each of the seven boroughs.

Dusch, 387 U.S. at 114. this was termed the "Seven-Four Plan."

Electors of the five of the boroughs brought suit, claiming that the Plan violated the principles of Reynolds v. Sims, 377 U.S. 533, which established the so-called "one person, one vote" rule.[6] The District court disagreed, and upheld the Plan. the Court of Appeals reversed, and the case went to the Supreme Court. the Court initially noted that the Plan made "no distinction on the basis of race, creed, or economic status or location. each of the 11 councilmen is elected by a vote of all of the electors in the city." The Court them considered the residency restrictions placed on seven members of the council, and concluded that such restrictions did not doom the Seven-Four Plan. Quoting from an earlier case, the Court stated:

> "The statute uses districts...merely as the basis of residence for candidates, not for voting or representation. Each district's

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[6] The plaintiffs based their claim upon the fact that the boroughs varied widely in population; the urban boroughs were extremely populous, while the rural boroughs were sparsely populated. Accordingly, the plaintiffs argued, the council members did not represent equal numbers of people, as required by Reynolds.

> senator must be a resident of the district, but since his tenure depends upon the county wide electorate he must be vigilant to serve the interest of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator."

Dusch, 387 U.S. at 115 (quoting Fortson v.Dorsey, 379 U.S. 433, 438 (1965)). In short, the Court concluded that because the entire population elected all members of the council, each member of the council, regardless of that member's residency, must be sensitive to the needs of the population as a whole.

This is not to suggest, however, that there was no reason to have the residency allocations provided for in the statute. the Court adopted the reasoning of the District Court:

> "The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area."

Dusch, 387 U.S. at 116 (quoting the District Court). Concluding that this justification refuted any indication of "invidious discrimination," the Court held the Seven-Four Plan valid.

The same is true here. Local school council members are required to represent the individuals who elected them. See Dallas County v. Reese, 421 U.S. 477,

480 (1975) (acknowledging the "basic teaching that elected officials represent all of those who elect them, and not merely those who are their neighbors"). Indeed, it is in their best interest to do so, since any individual parent, for example, who does not consider and represent the views of all of the electors may well find himself or herself ousted in the next election.[7]

This is not to suggest, of course, that parent representatives and community representatives are fungible. As discussed further below, parents have a unique and significant interest in the education of their children. But just as parent representatives and community representatives are not fungible, it is likewise true that not all parent representatives are fungible. It is this basic concept which justified the holding of Dusch, and which dictates our decision today. Voters are free to elect individuals who best represent their views, and those individuals, in turn, will represent the electors' views. In the present action, plaintiffs would have us adopt the opposite presumption, i.e., that parents are essentially a homogeneous voting block, insensitive to the views of those who elected them. However, we are bound to reject such a presumption. As the Supreme Court has noted:

> [The Court of Appeals relied on a theoretical presumption...that elected officials will represent the districts in which they reside rather than the electorate which

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[7] The dubious wisdom and administrative efficiency of the legislature's populist approach of delegating supervisory and policy-making authority to local school councils dominated by lay members is not before us. the Illinois general Assembly must ultimately judge whether this experiment has been successful, that is, has there been a resulting improvement or deterioration in Chicago public education.

> chooses them. But that is precisely the proposition rejected in Dusch.

Dallas County, 421 U.S. at 481.

We are likewise unwilling to accept the implicit contention that the disparity of seats between parent representatives and community representatives automatically dictates finding of unconstitutionality. We initially note that in Dusch, the Court acknowledged that, given the population breakdown, the voters of the two largest boroughs could elect all eleven council members, even though the elections were at large. It is equally apparent that the voters of those two urban boroughs could likewise always have a majority of the council comprised of their own residents; i.e., the two resident-designated members, plus the four at-large members. Despite this fact, the Court was unwilling to rule the Plan unconstitutional absent some showing that it actually served to "minimize or cancel out' the voting strength of elements of the population. Dusch, 387 U.S. at 117.[8] Accordingly, a

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[8] We assume that such a showing would be even more difficult in this case than in Dusch. Although the parties have not provided us with the number of community resident voters versus the number of parent voters, it is likely that the former is significantly larger than the latter. Accordingly, community residents would need to demonstrate not only that the elected local school council actually minimized their voting strength, but also that they were powerless to elect a local school council which would effectively represent their interests. Because we are unwilling to assume that parents are uniformly unable to represent the interests of community residents (assuming such "interests" are themselves even identifiable), a showing that community residents are truly powerless in electing a local school council would be virtually impossible to make.

disparity in the number of seats held by particular group does not inexorably lead to a conclusion of unconstutionality.
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We acknowledge that, unlike the situation in Dusch, the School Reform Act mandates a discrepancy in seats in favor of one particular group. We are not convinced however, that this distinction in turn mandates a different result, since the basic premise of Dusch, i.e., persons elected at large represent all electors, remains true. In any event, we are unwilling to find the School Reform Act unconstitutional based upon this fact, because we find that the allocation of seats on local school councils survives equal protection scrutiny. Our threshold inquiry is to determine the appropriate standard under which the election scheme is to be reviewed. plaintiff's maintain that " any alleged infringement of the right of citizens to vote must past strict scrutiny." This contention is simply incorrect. In Anderson v. Celebreeze, 460 U.S. 780, 788 (1983), the Supreme Court noted that "[constitutional challenges to specific provisions of a State's election laws...cannot be resolved b any 'litmus-paper test' that will separate valid from invalid restrictions."Instead, the Court set forth the following balancing test to be applied in considering the constitutionality of a given election law:

> [A] court...must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing

> court in a position to decide whether the challenged provision is unconsitutional. the results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made.

Id. at 789-90 (citations and internal quotation marks omitted). Accordingly, we shall consider the provisions of the School Reform Act in light of the test enunciated in Anderson.

The "character and magnitude" of any injury to plaintiffs' voting rights under the present system is relatively small. All voters, be they parents or community representatives, are entitled to exercise the same number of votes, and may vote for whichever candidates they choose. In addition, any eligible person interested in running for a position on the local school council may do so; no particular individual or interest is precluded from being a candidate. this case is thus unlike those cited plaintiffs in which a strict scrutiny standard applied. For example, in Williams v. Rhodes, 393 U.S. 23 (1968), the Supreme Court found that Ohio's election law was structured such that only Democratic and Republican party candidates could typically qualify on the ballot for President and Vice President. the court concluded that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." Id. at 31. Likewise, in Kramer v. Union Free School District, 395 U.S. 623 (1969), the State of New York limited the right to vote for school board members in certain areas to parents of enrolled children and owner or lessees of taxable property in the district and their spouses. Because the statute completely precluded other, presumably interested, citizens from voting, the Supreme Court concluded that it failed to satisfy a strict scrutiny standard. Id. at 630-633. Similarly, in

Goldman-Frankie v. Austin, 727 F.2d 603 (6th Cir. 1984), the Six Circuit noted that Michigan's election law essentially foreclosed independent candidates access to the ballot. the court concluded that the relevant statutory provision, which granted voters "a franchise to elect members of the Michigan Board of Education and then limited] that franchise to those who support a party nominated candidate." was unconstitutional. Id. at 607.

Plaintiffs suggest, however, that the fact that community residents are entitled to run, and, indeed, are guaranteed positions on the local school councils is irrelevant, because the allocation of seats effectively limits the influence that community representatives might have. Accordingly, they argue, the burden on their right to vote is substantial. We disagree. First, as noted above, the mere fact that there are more seats allocated to parents on the local school councils does not mean that community residents will go underrepresented. because the elections are at large, each elected local school council member is both presumed and bound to represent the interests of all of the electors. Furthermore, there is simply no case which supports plaintiffs' contention that a system which allocates varying numbers of seats on an elected board requires strict scrutiny. in fact, both United States and Illinois Supreme Court cases impliedly refute such a contention. See, e.g., Quinn v. Millsap, 491 U.S. 95, 109 (1989) ("Missouri cannot entirely exclude from eligibility for appointment to this board all persons who do not own real property...."(emphasis added); Fumarolo, 153 N.E. 2d 1299-1300 ("[There may be a rational relationship between giving parents of children currently attending the public school an increased role in local educational governance...."). Because all members of the community are entitled to vote and receive an equal number of votes,and because no individual or "interest" is precluded from running for and serving on the local school councils, we conclude that the magnitude of any injury to plaintiffs'

voting rights is limited.[9]

We now consider the reasons preferred by defendants in support of the provisions relating to the election and composition of the local school councils. After hearing testimony from a variety of groups and reviewing voluminous research on the subject of education, the Illinois General Assembly concluded that "parents have special knowledge of the education needs of their children and a unique motivation to secure quality education for them." Public Act 87-454 (1991). In addition, the General Assembly found that "higher levels of student performance occurs [sic] in schools where parents have a significant voice in local school decision making and are otherwise significantly involved in the local school's activities." Id. In short, the legislature concluded that, because the persons most immediately and directly interested in the education of children are the children's parents, those parents should play a predominant role in shaping the means by which the children are educated. Accordingly, the General Assembly allotted parents a significant number of seats on each local school council.

In assessing the validity of the election scheme, this court is not to act as a "superlegislature." As the Supreme Court has stated:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the

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[9] We also note that this system would be automatically subject to strict scrutiny if the distinction were based upon some suspect class, such as race. See Kramer v. Union Free Sch. Dist., 395 U.S. 621, 628 n.9 (1969). In the present case, however, it is uncontested that plaintiffs are not part of a "suspect class."

> court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)). We conclude that the findings set forth by the legislature clearly justify the distribution of seats on the local school councils. It is entirely appropriate to give the persons most directly interested in the education of children, i.e., parents, a greater role than others in facilitating the running and improvement of the schools. And there can be little question that parents are uniquely interested in the quality of education. Consistent with the findings of the Illinois General Assembly, courts have long recognized that parents should and do play a vital role in the upbringing and education of their children.[10] See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("[The primary role of the parents is now established beyond debate as an enduring American tradition."); Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Illinois Supreme Court expressly acknowledged this point in Fumarolo:

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[10] This is not to suggest , of course, that other members of the community are disinterested in the education of youth. Plaintiffs correctly assert that all of a society is interested in ensuring that children receive the benefits of quality education. The Assembly, however, concluded that parents of children attending a particular school have a unique and greater interest in the direction and improvement of that school. We simply cannot conclude that the determination and the statutory provisions which stem from it are irrational or otherwise constitutionally infirm.

> [As the plaintiffs say, there may be a rational relationship between giving parents of children currently attending the public school an increased role in local educational governance and improvement in the school....

Fumarolo, 566 N.E. 2d at 1299-1300. In sum, the legislature has advanced legitimate, significant interests related to the education of public school children which justify the increased role for parents provided for the School Reform Act. Weighting these compelling interests against the limited burden on plaintiffs' voting rights, we conclude that the election and representation scheme provided for in the School Reform Act, as amended satisfies Fourteenth Amendment requirements.

Plaintiffs also argue that the actions taken by the legislature and the Mayor of Chicago in the interim period between the Illinois Supreme Court's decision in Fumarolo and the amendment of t he School Reform Act deprived them of their Fourteenth Amendment rights. Following the Fumarolo decision, the General Assembly passed Public Act 86-1477, which required the Mayor of the City of Chicago to appoint the membership of every local school council, every subdistrict council, the School Board Nominating Committee, and the Board of Education within seven days of the Act's January 11, 1991 effective date.[11] Given the large number of positions to be filled and the limited amount of time provided for the appointments, plaintiffs assert that the Mayor had no choice but to appoint the sitting members of each of the bodies to the same positions, which is precisely what he did. According to

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[11] Given the number of schools in the Chicago Public School system, this legislation required the Mayor to make over 5,500 appointments.

plaintiffs, this Act and the Mayor's actions thus constituted a "perpetuation of the discrimination" which had been found unconstitutional in Fumarolo. The plaintiffs conclude:

> As a result of the Fumarolo case, the legislature as well as the defendants were plainly on notice that the discriminatory scheme that they sought to perpetuate...was already unconstitutional. The legislature's decision to maintain the status quo when it knew that the status quo was unconstitutional operates as a violation of each legislator's oath of office, a violation of the public trust, and mocks the judicial system.

Accordingly, the plaintiffs argue, the actions taken by the various bodies are invalid.

However, even if the legislature and the Mayor's actions in fact "perpetuated" the unconstitutional scheme struck down in Fumarolo, the actions of the interim bodies are protected by the de facto officer doctrine. As the one Illinois court has noted:

> It is a general principle of law, that the ministerial acts of an officer de facto are valid and effectual when they concern the public, and the rights of third persons, although it may appear that he has no legal or constitutional right to the office. The interests of the community imperatively requires the adoption of such a rule.

Andrulis v. First Nat'l Bank, 281 N.E. 2d 417, 420 (Ill. App. Ct. 1972) (quotations omitted). In the present case, the General Assembly temporarily granted to the Mayor of

Chicago the power that he held prior to passage of the initial School Reform Act. The various members were thus serving with apparent good title, and are therefore entitled to treatment as de facto officers. Indeed, this conclusion is further supported by the fact that the solution devised by the General Assembly and the Mayor was suggested by the Fumarolo court itself. in concluding the Fumarolo opinion, the Illinois Supreme Court stated:

> The City has acted under the Reform Act...to put a board of education in place and may wish to consider whether the board formed under the Reform Act should be treated as a de facto board of education until another board is designated and qualified by law.

Fumarolo, 566 N.E. 2d at 1309. the Mayor did, in effect, just that, and extended the temporary remedy to include the local school councils and the subdistrict councils. To assert that implementing a solution initially suggest by Illinois' highest court "mocks the judicial system" is therefore somewhat disingenuous. Furthermore, the only possible remedy for this alleged constitutional violation is to invalidate the actions of the interim bodies. However, this is precisely the dramatic and unnecessary action which the de fact officer doctrine is designed to prevent. As the court in Barrett v. Craven County Bd. of Educ., 70 F.R.D. 466, 483 (E.D.N.C. 1976), stated in applying the de facto officer doctrine in a similar situation,

> The entire community has a substantial interest in the stable and orderly administration of the schools. To retroactively invalidate the actions of the ...Board of Education would have a disastrously disruptive effect on the administration of the...County School

> System and, therefore, on the education of...County students.

Because the de facto officer doctrine applies in the present situation, we reject plaintiffs' claims.

Plaintiffs also argue, by extension, that Public Act 87-454 further "perpetuated the unconstitutional discrimination" of the original School Reform Act by "establishing a bizarre scheme requiring LSC elections to be controlled and run by LSC members who may be running for election." In support, plaintiffs point to the provisions of Public Act 87-454 which direct the local school councils to publicize the date and place of the elections, as well as the names of the persons nominated. In addition, they note that the councils are obliged to declare, certify, and publish the results of the elections. However, plaintiffs fail to cite any legal authority for their proposition that this system is "bizarre" and violative of constitutionally protected rights, likely because such authority does not exist. On the contrary, the practice complained of by plaintiffs exists at virtually every level of both state and federal government. Indeed, Article I, Section 4 of the United States Constitution provides that "[the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Section 5 additionally states that "[each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members...." Plaintiffs' suggestion that the provisions of the School Reform Act which allow sitting local school councils to administer elections are unconstitutional is therefore untenable.[12]

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[12] Plaintiffs argue that this "infirmity" was exacerbated because the first elections after the enactment

Accordingly, we deny plaintiffs' motion and grant defendants' motion for summary judgment on Counts XIII through XVIII.[13]

Finally, plaintiffs raise a number of claims under various provisions of the Illinois constitution. Only a few of them merit even brief consideration[14] Plaintiffs maintain

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of Public Act 87-454 were administered by the local school councils which had been appointed by the Mayor pursuant to Public Act 86-1477, which plaintiffs claim were unconstitutionally impaneled. As stated above, however we conclude that he actions of the appointed councils are not subject to plaintiffs' current attack. In any event, absent some allegation of fraud, we are unwilling to conclude that the initial election of local school council members pursuant to Public Act 87-454 "perpetuated" any "unconstitutionality." Cf. People ex rel. Engle v. Kerner, 205 N.E. 2d 33, 29-40 (Ill. 1965) (allowing unconstitutionality districted legislature to redraw districts.)

[13] Plaintiffs also claim that Public Act 87-454 violates the substantive due process of the Fourteenth Amendment because it fails to guarantee a republican form of government. However, "[the clause guaranteeing to each state a republican form of government had been held not to be justiciable." Risser v. Thompson, 930 F.2d 549, 552 (7th Cir.) (citations omitted), cert. denied, 112 S. Ct. 180 (1881). Indeed, this particular rule is "well entrenched." Id. Accordingly, defendants are entitled to summary judgment on this claim.

[14] Plaintiffs' claims under Article III, Sections 1 and 3 are essentially variations of plaintiffs' equal protection arguments. Accordingly, for the reasons we offered above in rejecting plaintiffs equal protection arguments, we conclude that defendants are entitled to summary judgment

that the School Reform Act fails to comply with the requirement in Article III, Section 4 of the Illinois Constitution which requires that the General Assembly ensure the integrity of the election process and facilitate voting by all qualified persons. However, the statute itself provides that: (1) the elections are to be conducted by the board in consultation with the local school council; (2) the local school councils are required to publicize the relevant information about the elections by posting notices at the attendance center and at public places within the boundaries of the attendance center, by distributing notices to pupils, and by any other means necessary to insure maximum involvement; (3) voting is by secret ballot; (4) voting areas are open from 6:00 a.m. to 7:00 p.m. on election day; (5) disputes about procedures or results are resolved by the subdistrict superintendent; and (6) the Board may promulgate any other rules and regulations necessary to insure fair elections. See 105 ILCS 5/34-2.1. It is therefore clear that the Act not only sets basic requirements for the elections, but also delegates much authority to the Board of Education for further ensuring the integrity of the elections, which the Board has done in passing regulations regarding the elections. Notably, plaintiffs here failed to even attempt a showing that these provisions have failed, or that the voting process is not fair or does not facilitate voting by all qualified persons. Without such a showing, however, we are not inclined to even consider plaintiffs' claim based on Article III, Section 4. Cf. Zbinden v. Bond County Community unit. Sch. Dist.

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on Counts XX and XXI. To the extent that plaintiffs claim that the amended School Reform Act violates Article III , Section 1 of the Illinois Constitution because it allows all voters to cast only five votes when there are eight elected positions, we not that plaintiffs offer no authority for this position, and we are aware of note. Accordingly, we reject plaintiff's argument in this regard as well.

No. 4, 117 N.E. 2d 765 (Ill. 1954) (same constitutional provision not implicated absent specific showing of fraud).

Finally, plaintiffs argue that the General Assembly exceeded its authority under the Illinois Constitution when it provided for the election of local school councils without first designating them units of local government. Article VII, Section 8 of the Constitution provides:

> Townships, school districts, special districts and units, designated by law as units of local government, which exercise limited governmental powers or powers in respect to limited governmental subjects shall have only powers granted by law....The General Assembly shall provide by law for the selection of officers of the foregoing units....

Plaintiffs read this section to state that the legislature may only provide for the selection of officers of a given body if it has first designated that body a "unit[] of local government."" But this, of course, is not what it says. Instead, the section states that the legislature shall provide for the selection of officers for a body which is a unit of local government. In other words, it does not limit the authority of the legislature to provide for selection of officers of a given governmental body; rather, it limits (or, more accurately, eliminates) the authority of units of local government to provide for the selection of their own officers. Accordingly, this provision of the Illinois Constitution is not implicated, and plaintiffs have failed to direct us to any other constitutional provision which might restrain the legislature from providing for the election of local school councils.[15] Defendants are therefore entitled to summary judgment on Count XXII.

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[15] In any event, we are unconvinced by plaintiffs argument that local school councils members are not

B. Principals' Claims

Plaintiffs raise several challenges to the General Assembly's decision to eliminate tenure for Chicago Public school Principals. [16] First and foremost, they claim it violates article I, section 10 of the United States constitution and article I, section 16 of the constitution of Illinois, which prohibit government from passing legislation which retroactively impairs contractual obligations. Central to plaintiffs' claims is their assertion that the Act of 1917, which initially granted tenure to principals and teachers, created a contractual right to tenure. Because we disagree, we conclude that defendants are entitled to summary judgment on these claims.

Our consideration of this issue is guided by a series of United States Supreme Court opinions issued in the mid 1930s. In Dodge v. Board of Education, 302 U.S. 74 (1937), the Court considered an Illinois law which provided for the retirement of teachers and payment of annuities to retire at age 65, and collect an annual annuity of $1000 to $1500, depending upon the teacher's age at retirement. Some years later, however, the legislature amended the law to set compulsory retirement at age 65, and reduced the annuity to $500 per year. The Illinois

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officers of the school district. Assuming that they are, then the General Assembly is unquestionably entitled under Article VII, Section 8 of the Illinois Constitution to provide for their selection.

[16] Plaintiffs also claim that the Act destroys the affected individuals' tenure as teachers, since principals who are not retained as principals are relegated to "teacher eligibility lists" with no guarantee of future employment, even though they had earned tenure as a teacher prior to becoming principals.

Supreme Court concluded that the amendment acted retroactively, and therefore applied equally to persons who had already retired and persons who subsequently retired. Id. at 76-77.

Plaintiffs, who had either retired or were eligible for voluntary retirement prior to the amendment of the law, challenged the amendment, claiming that their rights to annuities were vested rights and that the law established a contract between them and the state. The Illinois Supreme Court disagreed, and the United States Supreme Court affirmed. The Court initially noted:

> In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state, the case for an obligation binding upon the sate is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency.

Id. at 78-79 (footnotes omitted). Relying upon the rationale advanced by the Illinois Supreme Court, the Court concluded that neither the language of the statute nor the circumstances of its adoption demonstrated an intent to create a contractual obligation. Instead, it merely set the level of the retirement annuity for teachers, and was essentially a gratuity, involving no agreement of the

parties.[17] Id. at 79-80. Accordingly, the Court found that no contract existed, and the legislature could therefore amend the statute at will.

Similarly, in Phelps v. Board of Education, 300 U.S. 319 (1937), the Court concluded that a law which established tenure and prohibited salary reduction for teachers and principals did not create contractual rights and the state legislature was therefore free to subsequently amend or eliminate those provisions. The Court approvingly quoted a portion of the state court's opinion:

> [The law] established a legislative status for teachers, but we fail to see that it established a contractual one that the Legislature may not modify.... The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a statute, like that of the incumbent of a statutory office, which the Legislature at will may abolish, or whose emoluments it may change.

Id. at 322. The court additionally noted that the employee "assumed no binding obligation to remain in service" and the prohibition against salary reduction and discharge "was but a regulation of the conduct of the board and not a term

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[17] The plaintiffs maintained that "they, as teachers, especially those who voluntarily retire when otherwise they would not have been required so to do, rightly understood the state was pledging its faith that it would not recede from the offer held out to them by the statute as an inducement to become teachers and to retire." Id. at 80. The Court rejected this argument, noting that prior to the adoption of the statute, Illinois courts had consistently held that such benefit systems did not create contracts or vested rights. Id.

of a continuing contract of indefinite duration...." Id. at 323.

Finally, in Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938), the Supreme Court did find that a contract was created by the Indiana Teachers' Tenure Act. That statute provided that, following a five year probationary period, a teacher who entered into a contract with a school board was entitled to permanent employment. The statute further provided that"upon the expiration of any contract between such school corporation and a permanent teacher, such contract shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." Ind. code Ann. Sec 6967.1 et seq. (Burns Supp. 1929). In concluding that the statute itself used the term "contract" twenty-five times in the relevant portions, and spoke "of making and canceling of indefinite contracts." Brand, 303 U.S. at 105. In addition, the Court relied upon the fact that, prior to the case before it, the Indiana Supreme Court had routinely held that the rights created by the Act were contractual in nature. Based upon these factors, the Court concluded that the statute created contractual rights, and, as a result, the state could not simply take them away. Id.

Plaintiffs in the present action would have us reach the same conclusion as the Brand court. We initially observe that plaintiffs have a very heavy burden. First, defendants are entitled to a presumption that the law "is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise." Dodge, 302 U.S. at 79 (footnote omitted). See also National R.R. Passenger Corp. . Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985) (same). Furthermore, "where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state....Unless these views are palpably erroneous we

should accept them." Phelps, 300 U.S. at 322-23 (footnote omitted).

In Fumarolo, the Illinois Supreme Court determined that teachers and principals did not have a contractual right to continued employment, and therefore concluded that teachers an principals did not have a contractual right to continued employment, and therefore concluded that the School Reform Act did not violate the "impairment of contract" provisions of either the United States or Illinois Constitutions. At first glance, this holding would seem to be dispositive of plaintiffs' state law claim, and highly persuasive with respect to plaintiffs' federal law claim. See Phelps, 300 U.S. at 322-23. Plaintiffs, however, have disputed the relevancy of the Fumarolo court's pronouncements in this area, and, indeed, assert that the court's conclusions should be ignored in the present action. We shall therefore first consider plaintiffs' challenge to the percentile value of Fumarolo.

As discussed above, the Illinois Supreme Court concluded that the School Reform Act was unconstitutional based upon the provisions for the election of the local school councils. Accordingly, the Court determined that it was "not formally necessary to consider" the tenure claims. Fumarolo, 566 N.E. 2d at 1304. It nonetheless acknowledged that "these issues may arise again should the legislature choose to reenact the legislation in a different form," and therefore chose to examine the tenure claims. Id. Plaintiffs assert that, by the Court's own admission, the analysis of these issues in Fumarolo is at most mere dicta, and thus not entitled to deference. however, it is well established that "[considered dicta of a state supreme court must be given weight by a federal court in ascertaining state law...." In re Air Crash Disaster Near Chicago, 701 F.2d 1189, 1196 (7th Cir.), cert. denied, 464 U.S. 866 (1983); see also Fehlhaber v. Fehlhaber, 681 F. 2d 1015, 1023 (5th Cir. 1982) ("[Considered dictum is to be

followed as well as a precise holding."), cert. denied, 464 U.S. 818 (1983). Defendants maintain that the Fumarolo court's analysis clearly qualifies as considered dicta. Indeed, the court engaged in a lengthy discussion of the issues, analyzed relevant case law, and effectively responded to the arguments made by the plaintiffs in that action. in response, however, plaintiffs offer several reasons why the Court's conclusions are not entitled to the deference afforded "considered dicta." First and foremost, plaintiffs argue that the Fumarolo court did not have in front of it the history leading upon the 1917 law which first provided for permanent employment of teachers and principals. Because the circumstances surrounding the enactment of a statute are essential in determining whether the statute creates contractual rights, plaintiffs maintain, the Fumarolo court's analysis was necessarily lacking.

We first observe that, while the history surrounding the passage of legislation alleged to create contractual rights is no doubt of assistance in understanding the statute, "it is of first importance to establish the language of the statute." Dodge, 302 U.S. at 78. See also Brand, 303 U.S. at 104 ("Where the claim is that the state's policy embodied in a statute is to bind its isntrumentalities by contract, the cardinal inquiry is as to the terms of the statute supposed to create such a contract.") Accordingly, the Fumarolo court's focus court's focus on the language of the statute was not only not erroneous, it was entirely proper. In any event, having reviewed the history of tenure for principals and teachers, we resolve that it would not have changed the conclusion reached by the Illinois Supreme Court. The Rules and Regulations of the Board of Education of Chicago prior to the enactment of the 1917 law do indeed provide for permanent employment of teachers and principals following a given probationary period. However, like the law itself, these Rules nowhere mention that they are creating contractual rights, nor do they even mention the word contract. In enacting legislation following the

Illinois Supreme court's decision in Fursman, the legislature was presumably merely "declar[ing] a policy to be pursued," i.e., a continuation of the permanent employment that teachers and principals enjoyed prior to Fursman. Neither that policy nor the Rules of the Board, however indicate an intent to create a contractual right which would forever prevent the Illinois General Assembly from pursuing another policy. Because the language of the statute's passage provides little additional insight, we conclude that the Fumarolo court's resolution of the tenure issues constitutes "considered dicta," and we shall therefore treat it as dispositive with regard to the state law claim.[18]

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[18] Plaintiffs' other objections to the Fumarolo court's analysis are likewise unavailing They initially maintain that the Court "failed to apply well-established Illinois case law to the contract claim under the Illinois Constitution." In support, plaintiffs claim that the Illinois Constitution prohibits retroactive impairment of any vested rights, not just vested contractual rights. Whether this is true is irrelevant, since the Fumarolo court expressly concluded that the plaintiffs in that action had no vested rights through enactment of the statute. What the Court did conclude was that the plaintiffs had a "property interest" in continued employment. However, as the Fumarolo court concluded, a property interest is a far cry from a vested right to continued employment, and in any event, does not implicate the "impairment of contracts" provisions in the Illinois Constitution . See Fumarolo, 566 NE. 2d at 1306. Similarly unavailing is plaintiffs' argument that the Court failed to consider a "justice, fairness and equity" exception to retroactive application of a statute. First, the cases relied upon by plaintiff are Illinois Appellate Court cases, rather than Supreme Court precedent. Furthermore, in another part of its opinion, the Court concluded that 'enactment of the statute was not arbitrary or irrational," and involved the participation of all interested parties. Id. 566 N.E. 2d at 1307. Accordingly, the "justice, fairness and equity"

Accordingly, defendants are entitled to summary judgment on Count III of plaintiffs' complaint.

In addition, the Fumarolo court's analysis of plaintiffs' federal claims is to be considered highly persuasive. This is particularly true in the context of the Contracts Clause of the United States Constitution, since, as noted above, "where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state...Unless these views are palpably erroneous we should accept them." Phelps, 300 U.S.at 322-23 (footnote omitted). In the present action, we cannot conclude that the views expressed in Fumarolo are "palpably erroneous." We shall presume that statutes such as the one at issue here are merely declarative of legislative policy, rather than intended to create contractual or vested rights. Dodge, 302 U.S. at 79 (footnote omitted). And, as discussed above, we see nothing in the language or history of the 1917 statute to defeat that presumption. Unlike the statute involved in Brand, the 1917 act never mentions the word "contract," nor does it provide any other indication that the legislature intended to create contractual rights. Furthermore, the Fumarolo court found that, with one exception of arguable value, Illinois courts have consistently "concluded that legislative acts fixing the terms or tenure of employment of employment of public employees do not create private contractual rights." Fumarolo, 566 N.E. 2d at 1305. Thus, the other factor which convinced the Brand court that a contract existed, i.e., consistent state interpretation of the statute as creating contractual rights, is not only absent here, it is directly refuted. Accordingly, we agree with the Illinois Supreme court that the 1917 act did not vest plaintiffs with

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exception, even if eventually adopted by the Illinois Supreme Court, was not implicated by the School Reform Act.

contractual rights, and conclude that the School Reform Act does not violate the Contracts Clause of the United States Constitution.[19] Defendants are therefore entitled to summary judgment on Counts I and II.[20]

Plaintiffs next argue that the United States and Illinois Constitutions are violated because principals whose contracts are not renewed are also deprived of the tenure they earned as teachers.[21] That is, such individuals are

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[19] Plaintiff also argue that he legislature's failure to use limiting language (e.g., reserving the right to repeal or amend the statute) is indicative of its intent to be contractually bound. However even the case which plaintiff cites for this proposition only relies upon the inclusion of such language as an afterthought confirming its conclusion that no contract existed. In short, while the use or exclusion of limiting language may assist the court in determing whether a contract exits, it is by no means dispositive of the issue.

[20] For the same reasons, plaintiffs' promissory estoppel claim must fail. That is, an individual cannot reasonably rely on continued employment absent some vested right thereto. See Smith v. United States, 723 F. Supp. 1300, 1309 (.D. Ill. 1989) ("A property interest is created by state law; therefore it can also be removed by state law. While the state is not free to confer a property interest such as tenure on a public employee, and then arbitrarily discharge that employee in violation of that interest, a state is free to abolish the entire interest.") See also Dodge, 302 U.S. at 80 (finding against plaintiffs notwithstanding their claim they relied upon statutory "representations" to their detriment.

[21] An individual must earn tenure as a teacher prior to becoming eligible to be a principal.

placed at the end of "teacher eligibility lists," with no guarantee of future employment. Tenured teachers who are not retained for reasons unrelated to cause, on the other hand, are titled "supernumerary" teachers and are guaranteed employment and full salary and benefits. Plaintiffs maintain that this system violates both the substantive due process clause of the United States and Illinois Constitutions and the prohibition against bills of attainder in Article I, section 10 of the United States Constitution. We disagree.

These arguments are essentially minor variants upon the claim in Fumarolo that this system violated equal protection. Under that rubric, plaintiffs' claim failed because the court concluded that there existed a rational basis for distinguishing between principals' "teacher tenure" and teachers' tenure. See Fumarolo, 566 F.2d at 1308. As plaintiffs in the present action implicitly recognize, both of its present variations on the equal protection theme, i.e., substantive due process and bill of attainder, can similarly be overcome by a showing of rationality. See, e.g., Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 476 (1977) (consideration of whether law furthers "legitimate legislative purposes"); Pence v. Rosenquist, 573 F. 2d 395, 398 (7th Cir. 1978) (relevant test is whether the challenger can demonstrate that there is no rational connection between the policy and accomplishment of a public purpose"). The Fumarolo court relied upon the following factors in finding a rational basis for treating teachers differently than principals:

> Teachers who are performing satisfactorily but who lose their positions for nonperformance reasons could reasonably be given preferential consideration over administrators whose contracts were not renewed because of failure to meet performance standards and who wish to

> return to teaching. Also teachers are likely to be more familiar with current materials, curriculum and teaching practice because they have the most recent experience in the classroom. Also, the administrative nature of the principals' and subdistrict stated goal of the Act was to increase community control over the administration of the public school system. Guaranteeing an administrator's status might, therefore, be judged inconsistent with the goals the Act was attempting to achieve.

Fumarolo, 566 N.E. 2d at 1308. We are likewise convinced that there exists a rational relation between the goals of the Illinois General Assembly and the provisions of the School Reform Act which refutes any constitutional claim plaintiffs might allege. Defendants are therefore entitled to summary judgment on Counts VI-VIII.

Plaintiffs finally assert that they have been deprived of their property without just compensation, in violation of the taking clauses of the United States and Illinois Constitutions. They base this argument on the Fumarolo court's conclusion that they possessed a "property interest" in continued employment. Contending that all property rights are equally protected by the takings clause, plaintiffs maintain that they have stated a viable claim. We disagree. In Kisza v. Webster, 707 F. 2d 524 (D.C. Cir. 1983), cert. denied 464 U.S. 1042 (1984), the Court of Appeals for the District of Columbia Circuit rejected the very claim plaintiffs are making. It acknowledged that, for the purposes of the due process clause, a legitimate claim of entitlement to a benefit may constitute a property interest.[22] It then squarely rejected the claim that that same property interest implicated the takings clause:

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[22] This, of course, is consistent with the conclusion

> This presupposition is without foundation. As a leading commentator has admonished, "[t]he fifth amendment employs two independent clauses to address tow independent issues. A claim of deprivation of property without due process cannot be blended as one and the same with the claim that property has been taken for public use without just compensation." A "legitimate claim of entitlement" to a government benefit does not transform the benefit itself into a vested right. Rather, due process "property interests" in public benefits are "limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits."

Id., 707 F.2d at 539 (emphasis in original) footnotes and citations omitted). In short, absent a finding that plaintiffs have some vested right, a contention which both this court and the Fumarolo court have rejected, plaintiffs are unable to state a claim under the takings clause.[23] Accordingly,

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reached by the court in Fumarolo that plaintiffs had a property interest in their employment.

[23] Throughout their papers, plaintiffs maintain that the Fumarolo court concluded that they have a vested property right to continued employment. The Fumarolo, court reached no such conclusion. On the contrary, it found no indication that the legislature "intended to create vested contractual rights through enactment of the statute." Fumarolo, 566 N.E. 2d at 200. Likewise, the trial court found that plaintiffs had no vested right to continued employment. And although the Supreme Court concluded that plaintiffs had a property interest in their employment

defendants are entitled to summary judgment on Counts IX-XII.

III. Conclusion

For the reasons set forth above, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted. It is so ordered.

/s/_____
MARVIN E. ASPEN
United States District Judge

Dated 6/30/94

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which in turn entitled them to due process prior to elimination of tenure, the court notably did not refer to this interest as either "vested" or a "right." Plaintiffs' misconstruing of the Fumarolo court's words notwithstanding, it is clear that the court never held that plaintiffs had a vested right to tenure.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago, Illinois 60604
November 14, 1995

before
Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

SHIRLEY PITTMAN, et al
individually and as class representatives,
plaintiffs-appellents,

NO. 94-2850 v.

CHICAGO BOARD OF EDUCATION, et al;
defendants-appellees.

Appeal from the United States
District Court for the
Northern District of Illinois
Eastern Division.
No. 92 C 2219
Marvin E. Aspen, Chief Judge

ORDER

On September 15, 1995, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc.The petition is therefore DENIED.

No. 95-1318

Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SHIRLEY PITTMAN, BRUCE BERNDT, RALPH CUSICK, DAVID T. PETERSON, GWENDOLYN STEELE-BUTTE, FREDERICK SEARS, individually and as class representatives,

Petitioners,

v.

THE CHICAGO BOARD OF EDUCATION, JAMES E. RYAN, Attorney General of the State of Illinois, RICHARD M. DALEY, Mayor of the City of Chicago,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the statutory scheme for electing local school councils created by the Chicago School Reform Act violates the Equal Protection Clause.

2. Whether Illinois law afforded Chicago public school principals a protected property interest in the perpetuation of their statutory tenure that was taken without just compensation in violation of the Takings Clause when the Chicago School Reform Act eliminated tenure for principals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1318

SHIRLEY PITTMAN, BRUCE BERNDT, RALPH CUSICK, DAVID T. PETERSON, GWENDOLYN STEELE-BUTTE, FREDERICK SEARS, individually and as class representatives,

Petitioners,

v.

THE CHICAGO BOARD OF EDUCATION, JAMES E. RYAN, Attorney General of the State of Illinois, RICHARD M. DALEY, Mayor of the City of Chicago,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-11a) is reported at 64 F.3d 1098. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 12a-49a) is reported at 860 F. Supp. 495.

STATEMENT

In 1988, when the Illinois General Assembly enacted the first Chicago School Reform Act, there was a crisis in the Chicago public school system. See R. 96, ¶ 53.

Experts had called the Chicago public schools among the worst in the country. R. 85-1, Ex. 3. The School Reform Act was intended to reform and improve the Chicago public schools. See 105 ILCS paras. 5/34-1.01 & 1.02 (1994). The General Assembly identified ten specific goals it hoped to achieve through the legislation, including ensuring that students meet or surpass national norms in reading, writing, mathematics, and higher order thinking, and that students attend school regularly and graduate from high school at rates that match or exceed national norms. *Id.* para. 5/34-1.01(A). To achieve these goals, the General Assembly decided to grant greater autonomy to each local school. See *id.* para. 5/34-1.01(B). Accordingly, the 1988 Act created a local school council ("LSC") at each school. Each LSC consisted of six parents of children attending the school, elected by parents of children attending that school; two community representatives residing within the attendance area of that school and who were not parents of children attending the school, elected by residents within the attendance area who also were not parents of children attending the school; two teachers employed at the school, elected by the entire school staff; and the principal of the school. See P.A. 85-1418, § 34-2.1 (1988). Depending on vacancies on the LSC, parents could vote for up to six candidates, but nonparents could vote for at most two candidates. See *ibid.*

The 1988 Act also gave the principal of each school responsibility for supervising the educational operation of the school and for developing a school improvement plan with the assistance of the LSC. P.A. 85-1418, § 24-8.1 (1988). After a school improvement plan is developed and approved by the LSC, the principal is responsible for ensuring its implementation. See *ibid.* In addition, the Act gave the principal a measure of control of the school engineer and the food service staff, who for the first time were held accountable to the school principal. See *ibid.*

Before the 1988 Act, each principal's appointment became "permanent" after a three-year probationary period. See Ill. Rev. Stat. ch. 122, para. 34-84 (1987). A principal with a permanent appointment could be removed only for "cause." *Id.* The 1988 Act changed this by providing that each principal would be employed under a four-year performance contract. See 105 ILCS para. 5/34-8.1 (1994). Under the 1988 Act, principals are selected by the LSCs; each LSC evaluates the performance of the principal and then determines whether the principal's contract should be renewed. See *id.* para. 5/34-2.2. If the principal's contract is not renewed, the LSC may select a new principal to serve under a four-year contract. See *ibid.*

In *Fumarolo v. Chicago Board of Education*, 566 N.E.2d 1283 (Ill. 1990), the Illinois Supreme Court held that the 1988 Act unconstitutionally diluted the votes of community members who do not have children attending the public school by giving them two votes to cast for LSC members, while parents of children attending the public school could cast six votes for LSC members. See *id.* at 1300. The court refused to sever the invalid portions of the Act (*id.* at 1303), but went on to discuss the validity of the Act's elimination of tenure for principals "[b]ecause these issues may arise again should the legislature choose to reenact the legislation in a different form . . . ." *Ibid.* The court concluded that the elimination of "permanent" principals did not impair the obligation of contract or amount to a deprivation of property without due process. See *id.* at 1306-07.

After *Fumarolo*, the Illinois General Assembly enacted "an interim measure to assure stability and to protect the operation of the school system." P.A. 86-1477, § 1 (1991). This interim statute reenacted the provisions of the original Chicago School Reform Act dealing with the appointment of principals and placing them under four-year performance contracts. See *id.* §§ 34-2.3, 34-8.1. It re-established an LSC at each public school consisting of

the principal, and, in addition, two teachers employed at the school, six parents of children currently enrolled at the school, and two community residents, appointed by the Mayor of the City of Chicago. *See id.* § 34-2.1.

In September 1991, the General Assembly enacted a new version of the Chicago School Reform Act to replace permanently the version that had been invalidated in *Fumarolo*. Under the new Act, the elected members of each LSC consist of six parents of children at the school and two residents of the community within the school's attendance area. See P.A. 87-454, § 34-2.1 (1991). All eligible voters within a school's attendance area may vote for any candidate running in the LSC elections, and "[e]ach eligible voter shall be entitled to cast one vote for up to a total of five candidates, irrespective of whether such candidates are parent or community resident candidates." *Ibid.*

The petitioners, Chicago public school principals, filed a 22-count complaint challenging the validity of a variety of provisions of the 1991 Act. Petitioners sued the Chicago Board of Education, the Mayor of the City of Chicago, and the Attorney General of Illinois.[1] The district court certified a "tenure class" defined as all individuals who had earned tenure with the Chicago Board of Education as a teacher or a principal prior to the effective date of the new Act, for the purpose of challenging the provisions of the 1991 Act relating to the tenure rights of principals. The district court also certified a "community resident class" defined as "all individuals who are given the right to vote as community residents in local school council elections and to hold local school

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[1] The petition for certiorari incorrectly identifies the Attorney General as Roland W. Burris. While this case was before the court of appeals, Attorney General Burris was succeeded in office by James E. Ryan, who was therefore automatically substituted as a party by virtue of Fed. R. App. P. 43(c).

council seats," for the purpose of challenging the provisions of the 1991 Act governing LSC elections.

In June 1994, the district court awarded summary judgment against petitioners. The district court concluded that the 1991 Act did not offend one-person, one vote principles since all voters were granted an equal number of votes at LSC elections; the court reasoned that the allocation of six of the eight elected seats to parents was a qualification to serve in public office rather than an infringement on the right to vote, and thus was not subject to strict scrutiny. See Pet. App. 19a-27a. The district court also concluded that the requirement that only parents may serve in six of the seats advanced the state's interest in ensuring that members of LSCs would be knowledgeable, as well as directly interested in and highly motivated to address the problems of local schools; hence this requirement comported with equal protection. See Pet. App. 27a-29a. The district court also held that Illinois law had granted principals no vested right to retain tenure even if legislative judgments about the desirability of maintaining tenure were to change. See Pet. App. 36a-44a. And for this reason, the district court further held that the 1991 Act did not amount to a taking of principals' property rights for a public purpose without the payment of just compensation in violation of the Takings Clause. See Pet. App. 46a-47a.

In September 1995, the court of appeals affirmed the judgment of the district court, although on a different ground. The court of appeals held that one-person, one-vote principles do not apply to LSCs under the Chicago School Reform Act, since LSCs have neither the power to tax nor the power to set systemwide budgets or policies. Hence LSCs are "special-purpose governmental bodies" to which the requirement of one-person, one-vote does not apply. See Pet. App. 5a-8a. For this reason, reserving six seats for parents should be upheld unless it were irrational, and the court concluded that this new experiment on local school governance could not be

branded as irrational. See Pet. App. 8a. The court of appeals disagreed with the district court's conclusion that the allocation of six seats to parents did not affect the right to cast a vote of equal weight to all others. In the court of appeals' view, "the school law brings about a substantial dilution in the voting power of one class of voters, the nonparent residents." Pet. App. 4a. The court of appeals did embrace the district court's conclusion that principals had no vested right in the continuance of the tenure system that predated the School Reform Act, and accordingly rejected petitioners' Takings Clause claim because petitioners had no constitutionally protected property interest in the maintenance of their tenure rights. See Pet. App. 9a-11a.

ARGUMENT

Petitioners seek plenary review of an aspect of Illinois law that, as far as the parties are aware, is unlike any other in the country. In response to a crisis in the Chicago public schools, the General Assembly adopted legislation vesting certain responsibilities in local school councils. The law, as amended in 1991, reserves six of the eight elected seats on the LSCs for parents and further provides that principals should have no permanent tenure.

Petitioners claim that the allocation of six seats to parents violates the Equal Protection Clause because it dilutes the votes of nonparents. Petitioners rely on an asserted conflict between the holding of the court of appeals that LSCs under the 1991 Act are special-purpose governmental bodies and the conclusion of the Illinois Supreme Court in *Fumarolo* that LSCs functioning under the 1988 version of the Act exercised general governmental powers. But the conflict between the opinion below and *Fumarolo* is of little practical or legal significance and need not be resolved by this Court. In fact, it is far from clear that the state and federal courts have a different view on the constitutionality of the 1991 Act.

Moreover, because there are alternate grounds available on which the judgment below can be affirmed, even if the Court granted plenary review, it might conclude that it need not reach the voting rights questions that petitioners present.

Petitioners also claim that legislative alteration of their tenure rights amounts to a taking of their property for a public purpose without the payment of just compensation. But even *Fumarolo*, on which petitioners rely so heavily for their first claim, rejects petitioners' understanding of their tenure rights, holding that public school principals never had under Illinois law the kind of vested expectation in the continuance of tenure that could amount to a property interest protected against subsequent legislative alteration. The Chicago School Reform Act therefore does not run afoul of the Takings Clause.

Most important, on both issues petitioners press, the court of appeals decided narrow and fact-bound questions; and its analysis on both points—of the scope of LCSs' powers and principals' tenure rights under Illinois law—hardly warrants this Court's review. Accordingly, the petition should be denied.

1. The court of appeals concluded that the provisions of the 1991 Chicago School Reform Act governing the election of LSC members do not violate the Equal Protection Clause because LSCs are special purpose governmental bodies to which the constitutional rule of one-person, one-vote does not apply. Petitioners do not quarrel with the test the court below used to determine what constitutes a special purpose body, and it has long been clear that governmental bodies exercising limited powers of primary concern only to a discrete class need not conduct elections under one-person, one-vote principles, but instead may limit the franchise to the class primarily interested in their activities. See *Ball v. James*, 451 U.S. 355 (1981); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973)

(per curiam); *Salyer Water Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Petitioners claim only that the court of appeals misapplied this test when analyzing the particular powers granted LSCs by the Act. See Pet. 13-15. As the court of appeals observed, however, LSCs have no power to tax, or to decide how much will be spent at particular schools, nor do they have the power to set district-wide educational policies. Their decision-making powers are limited to matters affecting their own schools—determining how to implement district-wide policies and how a limited pool of discretionary funds will be spent at that school. See Pet. App. 7a-8a. Aside from *Fumarolo*, petitioners identify no decision of any court in which a governmental body with even remotely similar powers was held to be subject to one-person, one-vote principles. Instead, petitioners' exclusive basis for seeking certiorari is the conflict they assert exists between the opinion of the court of appeals and *Fumarolo*. That conflict, however, is more apparent than real, and has little practical or legal significance.

a. The conflict petitioners press has no practical significance because there is no risk of inconsistent results between the state and federal courts on the validity of the 1991 Act. The federal courts have upheld the law, and litigation over school reform now comes to an end in Chicago. Because of the preclusive effect of the decision below, there is no risk that the state and federal courts will reach inconsistent results on the validity of the 1991 Act. State courts must give res judicata effect to the decisions of the federal courts. See *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Ellens v. Chicago Area Office Federal Credit Union*, 576 N.E.2d 263, 265-66 (Ill. App. 1991). Here, the certified classes in this case include all Chicago voters and public school principals. Thus, any potential plaintiff who seeks to attack this system in the Illinois courts will confront res judicata, which prevents parties to a prior suit from relitigating the same

cause of action. See, *e.g.*, *People ex rel. Burris v. Progressive Land Developers*, 602 N.E.2d 820, 824-25 (Ill. 1992). And this result is hardly unfair to petitioners —had they wished to press their voting rights claims before courts bound by stare decisis to adhere to *Fumarolo*, they could have sued in the Illinois courts. Petitioners thus should not be heard to complain that the court of appeals did not consider itself bound by *Fumarolo*. Because the court of appeals has authoritatively decided the validity of school reform, its decision, if left unreviewed, creates no legal uncertainty or risk of inconsistent results between the state and federal courts.

b. The conflict petitioners press has little legal significance as well. The decision below and *Fumarolo* employ the same legal principles; they differ only on the narrow and fact-bound question whether LSCs under the Chicago School Reform Act exercise sufficiently general governmental powers to fall within the one-person, one-vote rule. And on that point, petitioners have identified no other school system anywhere in the country with a LSC structure similar to the one in Chicago. Thus the resolution of the fact-bound dispute between the court of appeals and the *Fumarolo* court is unlikely to have much if any legal significance. What is more, the significance of whatever disagreement there may be between the Seventh Circuit and the Illinois Supreme Court has been further eroded by 1995 amendments to the School Reform Act that have altered LSCs' powers by increasing the powers of the Board and its General Superintendent over LSCs. See P.A. 89-15, § 5 (1995). Thus the *Fumarolo* decision likely has limited applicability to the current version of the statute.

c. Finally, the conflict between the decision below and *Fumarolo* is more apparent than real. In fact, it is far from clear that the Illinois Supreme Court would have invalidated the 1991 Act even if, as petitioners claim, its view of the constitutional significance of the powers exer-

cised by LSC's differs from that of the Seventh Circuit. That is because the Illinois Supreme Court might well agree with the district court's view in this case that the 1991 Act did not infringe the right to vote, even for members of a general purpose government body, because the Act creates only a qualification to hold a public office that is not subject to strict scrutiny under the Equal Protection Clause.

Unlike the legislation invalidated in *Fumarolo*, which permitted community residents to vote for and elect only two of their number to LSCs while parents could vote for and elect six of their number to the six parental seats on each LSC, the 1991 Act grants all voters five votes that they may cast however they like. It is thus hard to see any way in which this legislation infringes the right to vote or the rule of one-person, one-vote, since each voter is given an identical number of votes to cast as he wishes. The 1991 Act also permits any community resident to run for office. At most, this legislation affects only the right to run for public office by making fewer seats available to community residents, but the right to run for or serve in public office is not considered a fundamental right triggering strict scrutiny under the Equal Protection Clause. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Bullock v. Carter*, 405 U.S. 134, 143 (1972). "[T]he mere fact that a state's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny.'" *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (quoting *Bullock*, 405 U.S. at 143). In *Clements v. Fashing*, the Court explained that only two types of restrictions on candidates' ability to gain election to public office are subject to strict scrutiny: those that create restrictions based on wealth, and those that impose burdens on new or small parties or on independent candidates. See 457 U.S. at 966. See also, *e.g.*, *Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Board of Elections v. Socialist*

Workers Party, 440 U.S. 173 (1979); *Lubin v. Panish*, 415 U.S. 709 (1974).

The Chicago School Reform Act of 1991 accordingly does not trigger strict scrutiny. It plainly does not restrict candidates' access to the ballot on the basis of economic status, political affiliation, or any other suspect basis: there is not a hint of an economic criterion, and candidates for seats on LSCs may place their names on the ballot regardless of their political affiliation. Candidates —whether they are parents of children attending the school or community residents—may come from any point on the political spectrum and need not be associated with any political party. It was such reasoning that led the district court to conclude that the 1991 Act is not subject to strict scrutiny. See Pet. App. at 21a-27a. And the district court's reasoning supplies a basis to affirm the judgment below without reaching the voting rights questions that petitioners present.

The court of appeals rejected the district court's approach for two reasons. First, it correctly rejected the idea that "limitations on candidacy cannot infringe the right to vote." Pet. App. 4a. Of course, we agree; but that does not mean that all limitations on candidacy infringe the right to vote. Here, as we explain, the 1991 Act includes no restriction of the type subject to strict scrutiny. Moreover, we agree that the example the court of appeals used to prove its point—that a statute "designed so as to permit only one actual candidate" (*ibid.*) —would be invalid, although not for the reason that the court gave. The court thought the problem was that such a restriction would deprive the electorate of "actual voting power." *Ibid.* But we are aware of no federal right to "actual voting power"; in fact state and local legislatures have plenary power as a matter of federal constitutional law to make any position appointive. *E.g.*, *Fortson v. Norris*, 385 U.S. 231, 233-34 (1966). Rather, the scheme described by the court of appeals would be unconstitutional—without regard to strict scrutiny—because

it would be an irrational restriction on the ability to run for public office. See generally *Quinn v. Millsap*, 491 U.S. 95, 106-09 (1989) (requirement that members of board drafting charter for local government be landowners is irrational); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970) (requirement that school board members be landowners is irrational). After all, there is no point in holding an election if the legislature has already picked the winner.

Second, the court of appeals concluded that even granting all voters an equal vote—as the 1991 Act does—will not comport with one-person, one-vote principles if successful candidates "cannot be trusted to be perfect agents" of some of the voters. Pet. App. 4a. The court then announced that it would "assume realistically that parents who have children in a school are not adequate representatives . . . of persons who do not." *Ibid.* Thus, since six of the eight elected LSC members must be parents, the 1991 Act, in the court of appeals' view, "brings about a substantial dilution in the voting power of" nonparents because they cannot be adequately represented by the six parental LSC members. *Ibid.* We know of no authority for the Seventh Circuit's expansion of one person-one vote principles through this "perfect agent" theory of representation. Moreover, the court's assumption that parents will not represent the views of the nonparents in the electorate is unsupported by any finding of the district court or evidence in the record, and we do not believe that a federal court has greater capacity to analyze the qualifications of parents to represent all of their constituents than does the legislature.

What is more, the assumption of the court of appeals is contrary to the appropriate presumption in voting rights cases set forth by this Court. The Court has explained that elected representatives—even though they may not share every characteristic of all of the voters—are presumed to serve vigilantly the interests of all who elect them. See *Dallas County v. Reese*, 421 U.S. 477,

479-80 (1975); *Dusch v. Davis*, 387 U.S. 112, 115 (1967); *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965). The Court has never precluded a requirement that elected representatives have greater qualifications for office than those possessed by all their constituents—if that were so, requiring elected prosecutors to be lawyers, for example, would presumably disenfranchise voters who are not attorneys. To the contrary, the Court has recognized the "basic teaching that elected officials represent all of those who elect them." *Dallas County*, 421 U.S. at 480. There is no reason to reject that teaching here. It seems clear that parent members of LSCs must at least attempt to represent the interests of community residents, or these voters can vote the parent members out of office at the next election. Surely it is realistic to assume that community residents can and do vote for parents of children attending the school who share their views on the issues that affect the particular school or their views on education in general.

When a candidate qualification is not based on a suspect criterion, it should be evaluated only to determine whether it "bear[s] some rational relationship to a legitimate state end." *Clements v. Fashing*, 457 U.S. at 963.[2] Thus, the allocation of six seats on each LSC to parents of children attending the school need only have a rational basis. And as the district court concluded, the 1991 Act surely bears a quite direct relationship to a legitimate state end. See Pet. App. 27a-29a. Improving the quality of education, previously in crisis, in a public school system in the largest city of Illinois is surely a

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[2] The district court thought that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), obligated it to apply a form of intermediate scrutiny to the 1991 Act. See Pet. App. at 24a-25a. But in *Anderson*, the statute at issue imposed restrictions on access to the ballot on the basis of partisan affiliation, and a form of heightened scrutiny was appropriate for that reason. See 460 U.S. at 787-88. The same is not true here.

legitimate state goal. And involving parents in LSCs is rationally related to furthering that goal.

Studies have shown that increased parental involvement in a school improves the level of education at the school. See R. 85-2, Exs. 5-8. Parents bring to the LSC special knowledge of the problems and needs of the school. Their knowledge and motivation enhances the ability of the LSC to do its job. The General Assembly rationally concluded that parent members of the LSC would likely be more knowledgeable and involved, and for that reason could provide more effective community input. This does not mean that parents are pursuing some special or self-interested agenda contrary to the interest of non-parent voters. Indeed, there is every reason to assume that both parents and community residents share a common interest in improving the quality of local schools consistent with district-wide budgeting and policies. This legislation is instead based on the recognition that parents' knowledge and motivation is particularly valuable in making the LSC an effective voice for each local community.

Just as the district court embraced the view that the 1991 Act did not trigger strict scrutiny and should be sustained as rational, the Illinois Supreme Court may well have upheld the 1991 Act on the same grounds as the district court had petitioners brought this case in state court. Thus, it is far from clear that the state and federal courts have a different view on the ultimate constitutionality of the 1991 Act. Moreover, because of the possibility that the judgment below can be affirmed on the alternate ground embraced by the district court, even if this Court granted plenary review, it might ultimately conclude that it need not reach the questions presented by petitioners.

d. In sum, then, the disagreement between the Illinois Supreme Court and the Seventh Circuit on the significance of LSCs' powers that petitioners claim exists is little

reason for this Court's review of the decision below.[3] The constitutional standards employed by both courts were the same, and their fact-bound application of a settled test to a unique set of powers granted LSCs in Chicago does not present a recurring question of nationwide significance. Indeed it is not even clear that the state and federal courts have a different view on the ultimate question whether the 1991 Act is constitutional. Nor is there any risk that the state and federal courts will reach inconsistent results on the validity of the Act, given the preclusive effect that the judgment below will have in subsequent litigation. And the existence of an alternate ground to affirm the judgment below means that the issues now pressed by petitioners may not prove dispositive even if the Court grants review in this case. For all these reasons, further review by this Court is unwarranted.

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[3] Petitioners also claim that the Seventh Circuit should have followed *Fumarolo* when deciding their voting rights claims brought under the Illinois Constitution. See Pet. 22. In their merits brief in the court of appeals, however, petitioners confined their state constitutional voting claims to a footnote, and although the court of appeals did not expressly say so, it likely considered the state constitutional claims waived given their cursory treatment. The Seventh Circuit has consistently held that arguments confined to a footnote or otherwise treated in a cursory fashion are waived. See, *e.g.*, *Tyler v. Runyon*, 70 F.3d 458, 464 (7th Cir. 1995); *Bakalis v. Golembeski*, 35 F.3d 318, 326 n.8 (7th Cir. 1994); *Casteel v. Pieschek*, 3 F.3d 1050, 1051 n.2 (7th Cir. 1993); *Dresser Industries, Inc. v. Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *Anderson v. Gutschenritter*, 836 F.2d 346, 349-50 (7th Cir. 1988); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984). Moreover, as we explain above, it is far from clear that the Illinois Supreme Court would have disagreed with the district court's analysis of petitioners' voting rights claims even assuming that it would have reached a different conclusion than the Seventh Circuit on state constitutional grounds when analyzing whether LSCs were special-purpose governmental bodies. Thus any implicit disagreement between the Seventh Circuit and the Illinois Supreme Court on state constitutional grounds does not merit this Court's intervention.

2. Petitioners also claim that the legislative modification of their tenure rights amounts to a taking of their property in violation of the Takings Clause. Petitioners, however, do not quarrel with the holding of the courts below—as well as the holding of the Illinois Supreme Court in *Fumarolo*—that Illinois law never granted public school teachers or principals any vested expectation that the legislature would never modify or abrogate statutory tenure rights. In fact, petitioners do not seek review of the holding below that their Due Process and Contract Clause theories lack merit precisely because Illinois law did not grant them any vested expectation that statutory tenure rights would remain inviolate. See Pet. App. 9a-10a. And because Illinois law never granted petitioners any vested expectation that the legislature would preserve their statutory tenure rights in perpetuity, petitioners' theory that the legislature's decision to modify tenure rights amounts to a taking of a constitutionally protected property interest is incorrect.

When individuals are deprived of rights to which they are securely entitled under state law, there is little question but that they are deprived of "property" within the meaning of the Due Process Clause; thus a government employee is deprived of a constitutionally protected property interest for due process purposes when he is fired without cause from a position to which statutorily granted tenure has attached. See, *e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There is, however, generally no vested expectation that the legislature will not alter the statutory entitlement itself, and for this reason, such an alteration deprives a public employee of no vested rights and does not amount to a "taking" of "property."

"A 'legitimate claim of entitlement' to a government benefit does not transform the benefit itself into a vested right. Rather, due process 'property interests' in public benefits are 'limited,' as a general rule, by the governmental power to remove, through prescribed procedures,

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the underlying source of those benefits.'" *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983) (emphasis deleted) (quoting *O'Bannion v. Town Court Nursing Center*, 447 U.S. 773, 796, 798 (1980) (Blackmun, J., concurring)), cert. denied, 464 U.S. 1042 (1984). Accord, *e.g., In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 988 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988). While there is a deprivation of property every time a tenured teacher is terminated, there is no taking every time the statutory entitlement creating the vested expectation giving rise to property rights is legislatively altered. To the contrary, it has long been settled that there is a presumption that tenure rights can be "altered at the will of the legislature." *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937). In *Fumarolo*, on which petitioners are otherwise content to rely, the Illinois Supreme Court expressly held that the Illinois School Code created no vested expectation that the legislature would never abolish tenure rights. See 566 N.E.2d at 1305-07. Thus the Chicago School Reform Act may have deprived principals of their tenure, but it did not take from them any vested right or expectation.

As the court of appeals correctly recognized (see Pet. App. at 10a-11a), this principle dooms petitioners' takings claim. Chicago public school principals had a legitimate claim of entitlement to continued employment during good behavior and efficient service under the former Illinois School Code (see *Fumarolo*, 566 N.E.2d at 1306), but no vested right to prevent the General Assembly from changing the provisions of the School Code (see *id.* at 1305-07). Because petitioners had no right to expect that statutory tenure would not be modified by subsequent legislation, the Illinois General Assembly's decision to modify it took nothing from petitioners that was securely theirs in the first place.

Both this Court and other circuit courts, in a wide variety of contexts, have analyzed takings challenges to

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legislative changes affecting benefits and other procedural rights consistent with the approach of the court of appeals in this case. See, *e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 606-09 (1987) (change in AFDC rules held not to be a taking); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) (change in pension regulation held not a taking); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (reduction in social security benefits held not a taking); *Hoffman v. City of Warwick*, 909 F.2d 608, 616 (1st Cir. 1990) (repeal of state statute providing seniority credits to veterans held not a taking); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d at 988-89 (federal law establishing Federal Tort Claims Act as exclusive remedy for injuries caused by atmospheric nuclear weapons testing even for cases already pending in state court held not a taking); *Kizas*, 707 F.2d at 539 (modification of special preference FBI gave to its clerical and support personnel who sought employment as FBI agents held not a taking).

Petitioners primarily rely on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which petitioners claim adopted a due process analysis for takings cases because of the quotation from *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Ruckelshaus*, the court discussed whether a trade secret could constitute property protected by the Takings Clause and wrote:

> In answering the question now, we are mindful of the basic axiom that " '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' "

467 U.S. at 1001 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), in turn quoting *Board of Regents v. Roth*, 408 U.S. at 577). But this reiterates only the general proposition with which the court of appeals had no quarrel—to assert a property

interest under either the Due Process or the Takings Clause, a plaintiff must identify some legitimate claim of entitlement from an independent source such as state law. The only other case petitioners cite on this point, *Calvert Investments, Inc. v. Metropolitan Sewer District*, 847 F.2d 304, 307 (6th Cir. 1988), also says no more than this.

Thus, to prevail on their takings claim, petitioners must identify some legitimate claim of entitlement under state law to prevent any legislative modification of their tenure rights. This, of course, they cannot do. As the courts below and the Illinois Supreme Court in *Fumarolo* concluded, Illinois law never granted petitioners any claim of entitlement to prevent the Illinois General Assembly from modifying or even abolishing statutory tenure rights. Without any such entitlement, petitioners were accordingly not deprived of the type of vested interest that amounts to constitutionally protected property when the Illinois General Assembly decided to abolish tenure rights as it was entitled to do. The *Roth* test, on which petitioners rely, simply does not help them.

Precisely because statutorily granted property interests seldom include an assurance that a legislature will not modify the statutory entitlements it creates, it should come as no surprise that the court below found the ambit of protection afforded to those who seek to challenge legislative modification of such entitlements is considerably narrower than the protection afforded to plaintiffs who hold other, less conditional forms of property. This distinction, for example, explains the result in *Ruckelshaus*, in which the Court addressed trade secrets, and concluded that they were entitled to the same form of constitutional protection as tangible property, since they "have many of the characteristics of more tangible forms of property." 467 U.S. at 1002. Petitioners identify no case in which statutorily created entitlements that are granted conditionally—that is, only unless or until the legislature modifies or repeals them—could not be altered

without the payment of compensation under the Takings Clause.[4] In short, the decision below is consistent with all others of which we are aware that address statutory entitlements such as tenure, and is fully consistent with this Court's approach to such takings claims. There is accordingly no justification for further review of the eminently correct decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[4] Indeed, *Calvert Investments*, the only other case petitioners cite on this point, found no taking when a municipality decided not to contract with Calvert for sewer service where state law granted Calvert no vested expectation that it could obtain such a contract. See 847 F.2d at 307-10.

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